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THE AMERICAN LAW OF OCEAN BILLS OF LADING

THE AMERICAN CARRIAGE OF GOODS BY SEA ACT, 1936

THE CANADIAN WATER CARRIAGE OF GOODS ACT, 1936

THE NEWFOUNDLAND CARRIAGE OF GOODS BY SEA ACT 1932

THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO OCEAN BILLS OF LADING, BRUSSELS, 1924, KNOWN AS THE HAGUE RULES

THE UNIFORM NORTH ATLANTIC BILL OF LADING, 1937

THE LIVERPOOL COTTON AGREEMENTS, 1907-1911.

Complete Texts, with Tables of Foreign Legislation, Ratifications and Adherences, a Historical Statement, and a Commentary.

BY

ARNOLD W. KNAUTH
of the New York Bar

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1941

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TO THE MEMORY OF

LOUIS FRANCK

1868–1937

PRESIDENT OF THE INTERNATIONAL MARITIME COMMITTEE, 1921–1937

MOST PATIENT LEADER AND MOST PRODUCTIVE LABORER
IN THE FIELD OF UNIFORMITY IN THE MARITIME
LAW OF ALL NATIONS

AND

CHARLES SHERMAN HAIGHT

1870–1938

CHAIRMAN OF THE BILL OF LADING COMMITTEE OF THE
INTERNATIONAL CHAMBER OF COMMERCE
1921–1938

INDEFATIGABLE IN URGING WORLD-WIDE ACCEPTANCE
OF THE HAGUE RULES

FOREWORD.

The ocean bill of lading is the vital document of international trade. As receipt, as contract of carriage, and as negotiable document of title, it must be satisfactory to consignor, consignee, shipowner, banker, underwriter, and the many other agencies which handle international commerce.

Recent legislation has profoundly altered the law of ocean bills of lading and created a demand for the new texts and a brief discussion of their effect. While this discussion is largely directed to the American Act of 1936, the statements may in general be applied to the Canadian and Newfoundland Acts by reading the references to Sections 1 to 8 inclusive as references to the Schedule, Articles I to VIII inclusive.

It is of course too soon to support a discussion with an array of citations of decided cases; much can, however, now be indicated with reasonable assurance.

The Convention of 1924 and the Acts represent a broad business adjustment of the risks of ocean transportation. In so far as the previous rules of law are changed, both parties win and lose something. Shipowners get rid of the implied warranty, of the *Isis* construction of the Harter Act, and of the stiffer rules as to a deviation. Cargo gets rid of the notice clause, the short time for suit clause, the $100 value clause, some thirty-nine specific "exceptions," the benefit of insurance clause, and the private carriage rule.

At the final House and Senate hearings, in 1935 and 1936, unanimous support of the measure was expressed. The last echo of the remaining opposition emanated from the desire of the Institute of Marine Underwriters to seize the occasion to bring about a legislative prohibition of the "both-to-blame" clause; but when it appeared that a reopening of the matter for the purpose of one amendment would lead to further struggles concerning other subjects of general disagreement, all opposition to the Bill as agreed upon was withdrawn. It is quite evident that the Rules, in 1936 as in 1921, represent the maximum of bill of lading standardization and uniformity obtainable in the present state of balance of the commercial and shipping interests of the world.

The texts have been painstakingly compared with the original statutes and are believed to be accurate. Notice of any errors would be gratefully received.

A. W. K.

January, 1938.

FOREWORD TO THE SECOND PRINTING—1941.

The first printing of this little book has been so well received that a second printing has become necessary. In the intervening three years, a number of cases have elicited judicial opinions throwing new or further light on various aspects of the subject. Two interesting new textbooks have contributed to the discussion—Professor Gustavus H. Robinson's *Handbook of Admiralty Law in the United States* in the Hornbook Series (1939) and *A Model Ocean Bill of Lading* by Eberhard P. Deutsch (1940). The outbreak of the European War in September 1939, following on the disturbance of maritime commerce by the Japanese invasion of China (1932), the Italian war against Ethiopia (1935) and the Spanish Civil War (1936), justifies a discussion of the war and restraint of princes clauses developed to meet these situations. The Commentary has accordingly been somewhat expanded to reflect these new sources.

Grateful acknowledgment is made to Messrs. Stanley W. Schaefer, of New York, T. W. Waugh, of Montreal and J. A. Wolfson of Manila for comments and suggestions for improvement of the text.

A. W. K.

New York, February, 1941.

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U. S. CARRIAGE OF GOODS BY SEA ACT, APRIL 16, 1936.

Effective July 15, 1936.

Public No. 521, 74th Congress. (S. 1152).
U. S. Statutes at Large, Vol. 49, pages 1207-1213.
Title 46, U. S. Code, Sections 1300-1315.

AN ACT

RELATING TO THE CARRIAGE OF GOODS BY SEA.

Note: The blackface captions and statutory references are not part of the statutory text as enacted, but are supplied for convenient reference. Each sentence is printed as a separate paragraph for similar convenience.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Scope—Ocean Bills of Lading—Foreign Trade—Inward and Outward.

U. S. Code, Title 46, Section 1300. 49 Stat. 1207.

That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

TITLE I.

(THE HAGUE RULES)

Terms Defined.

U. S. Code, Title 46, Section 1301. 49 Stat. 1208.

* SECTION 1. When used in this Act—

Carrier.

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

* These section numbers are uniform in all nations and should preferably be used.

Contract of Carriage Under B/L—When B/L Issued Under Charter Party.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

Goods—Live Animals—Deck Cargo.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except

Live animals and

Cargo which by the contract of carriage is stated as being carried on deck and is so carried.

Ship.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

Carriage of Goods, from Loading Until Discharge.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS—* SEC. 2.

U. S. Code, Title 46, Section 1302. 49 Stat. 1208.

Carrier's Duty and Rights.

Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES—* SEC. 3.

U. S. Code, Title 46, Section 1303. 49 Stat. 1208.

Due Diligence Before Beginning Voyage.

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

*** These section numbers are uniform in all nations and should preferably be used.**

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Carrier's Duty to Cargo.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Bill of Lading to Issue—Essential Statements.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

Identification Marks.

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

Number or Weight of Packages, etc.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

Order and Condition of Goods—Inaccurate or Unchecked Information.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

B/L Prima Facie Evidence of Receipt of Goods—Pomerene Act Not Affected.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance

with paragraphs (3) (a), (b), and (c) of this section: *Provided,* That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916 (U. S. C., Title 49, secs. 81-124, 39 Stat. 638), commonly known as the "Pomerene Bills of Lading Act." *

Accuracy of Marks, etc.—Guaranteed by Shipper; Indemnity for Error.

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of Loss or Damage—Visible Damage.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence on the delivery by the carrier of the goods as described in the bill of lading.

Notice of Loss or Damage—Concealed Damage.

If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Notice Endorsed on Receipt.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

Notice Not Required if Joint Inspection Had.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

* Text at pages 14-28.

Time for Suit, One Year.

In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered:

Effect of Failure to Give Notice.

Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

Mutual Rights of Inspection and Tally, in Case of Loss.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" Bill of Lading.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided,* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Negligence Clauses Other than Provided in Act, Null and Void.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

Benefit of Insurance Clauses, Null and Void.

A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

RIGHTS AND IMMUNITIES—* SEC. 4.

U. S. Code, Title 46, Section 1304. 49 Stat. 1210.

Immunities—Unseaworthiness Without Want of Due Diligence—Burden of Proof.

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Exemptions from Liability from Designated Causes.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

* These section numbers are uniform in all nations and should preferably be used.

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

Other Causes, Not the Fault of Carrier; Burden of Proof.

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Shipper Not Responsible for Damage to Carrier, etc. Without Fault.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Valuation of Cargo—Declaration of Excess Value.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful

money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Declaration of Value Not Conclusive.

This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

Increased Maximum Value Clauses Authorized.

By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named.

Carrier's Liability Not to Exceed Actual Damage.

In no event shall the carrier be liable for more than the amount of damage actually sustained.

Effect of Misstatements as to Nature or Value of Goods.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, Explosive, Dangerous Cargo—Character Concealed—Treatment, Disposition, etc.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

Inflammable, etc., Cargo—Character Not Concealed—Treatment, Disposition, etc.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be

landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES—* SEC. 5.

U. S. Code, Title 46, Section 1305. 49 Stat. 1211.

Surrender of Rights—Acceptance of Increased Liabilities Authorized.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

Act Not Applicable to Charter Parties—But B/L Issued Under Charter Party Shall Comply With Act.

The provisions of this Act shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Act.

General Average Clauses Authorized.

Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

SPECIAL CONDITIONS—* SEC. 6.

U. S. Code, Title 46, Section 1306. 49 Stat. 1211.

Cargo of Unusual Character May Be Carried on Special Terms Upon Non-Negotiable Receipts.

Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of

* These section numbers are uniform in all nations and should preferably be used.

the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Liability for Goods Prior to Loading or After Discharging From Ship.

U. S. Code, Title 46, Section 1307. 49 Stat. 1212.

† SEC. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Shipping Act, 1916—Limitation of Liability Statutes.

U. S. Code, Title 46, Section 1308. 49 Stat. 1212.

† SEC. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, 39 Stat. 728, 46 U. S. Code 801, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States; 46 U. S. Code 181-189, or of any amendments thereto; * or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

TITLE II.

(ADDITIONAL PROVISIONS)

Discrimination Between Competing Shippers Not Permitted.

U. S. Code, Title 46, Section 1309. 49 Stat. 1212.

SECTION 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, 39 Stat. 728, 46 U. S. Code 801, as amended.

* Text at Appendix C.

† These section numbers are uniform in all nations and should preferably be used.

Through Ocean Bills of Lading Issued by Railroad Carriers Under Interstate Commerce Act, Subject to This Act.

U. S. Code, Title 49, Section 25. 49 Stat. 1212.

SEC. 10. Section 25 of the Interstate Commerce Act (41 Stat. 498, 49 U. S. Code 25)* is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "*Provided, however*, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act."

Bulk Cargo—Weights Ascertained by Third Parties.

U. S. Code, Title 46, Section 1310. 49 Stat. 1212.

SEC. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Harter Act and Any Other Law Remain Applicable Before Loading and After Discharging Cargo.

U. S. Code, Title 46, Section 1311. 49 Stat. 1212.

SEC. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property," approved February 13, 1893, 27 Stat. 445, 46 U. S. Code 190-198,† or of any other law which

* Text of Section 25 at Appendix E.

† For text, see Appendix A.

would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Scope of Act.

U. S. Code, Title 46, Section 1312. 49 Stat. 1212.

SEC. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.

Terms Defined—United States.

As used in this Act the term "United States" includes its districts, territories, and possessions:

Action by Philippine Legislature May Exclude Application.

Provided, however, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands.*

Terms Defined—Foreign Trade.

The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries.

Domestic, Coastwise, etc. Trade—Application of Act to B/L by Agreement.

Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act:

Clause Paramount—Every Outward Foreign B/L Shall State That It Has Effect Subject to This Act.

Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.

* Text of Philippine Act at Appendix F.

Suspension of Title I by Presidential Proclamation.

U. S. Code, Title 46, Section 1313. 49 Stat. 1213.

SEC. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation.

Rescission of Proclamation.

The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea.

Effective Date of Suspension or Rescission.

Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Applicable Laws During Suspension.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may thus have been suspended.

Effective Date

U. S. Code, Title 46, Section 1314. 49 Stat. 1213.

SEC. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title

issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.

Short Title

U. S. Code, Title 46, Section 1315. 49 Stat. 1213.

SEC. 16. This Act may be cited as the "Carriage of Goods by Sea Act."

Approved by the President, April 16, 1936.

FEDERAL BILLS OF LADING ACT, 1916, AS AMENDED.

U. S. Code, Title 49, §§ 81-124.

39 Stat. L. 538 [S. 19]; amended 44 Stat. L. 1540 [S. 3286.]

KNOWN AS THE POMERENE ACT.

AN ACT RELATING TO BILLS OF LADING IN INTERSTATE AND FOREIGN COMMERCE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Bills of Lading—Issued in Interstate and Foreign Commerce Governed Hereby.

[SECTION 1]. **U. S. Code, Title 49, Section 81.**

That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this act.

Straight Bills Defined.

U. S. Code, Title 49, Section 82.

SEC. 2. That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Order Bills Defined—Negotiability.

U. S. Code, Title 49, Section 83.

SEC. 3. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this act unless upon its face and in writing agreed to by the shipper.

Issue of Order Bills in Parts for Continental Use Forbidden—Proviso—For Insular and Foreign Use Permitted.

U. S. Code, Title 49, Section 84.

SEC. 4. That order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however,* That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Duplicates—Character to Be Noted—Liability for Failure—Insular and Foregn Trades Excepted.

U. S. Code, Title 49, Section 85.

SEC. 5. That when more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however,* That nothing

contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Straight Bills Not Negotiable—Memoranda.

U. S. Code, Title 49, Section 86.

SEC. 6. That a straight bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Negotiability of Order Bills—Insertion of Name of Notify Party.

U. S. Code, Title 49, Section 87.

SEC. 7. That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Carrier to Deliver Goods on Demand—Conditions—Lawful Excuse.

U. S. Code, Title 49, Section 88.

SEC. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

To Whom Carrier Shall Deliver Goods.

U. S. Code, Title 49, Section 89.

SEC. 9. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Liability for Unlawful Delivery—Exceptions.

U. S. Code, Title 49, Section 90.

SEC. 10. That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Failure to Cancel Bill on Delivery of Goods—Liability to Subsequent Holder.

U. S. Code, Title 49, Section 91.

SEC. 11. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would

transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Delivery of Part of the Goods.

U. S. Code, Title 49, Section 92.

SEC. 12. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Alteration of a Bill.

U. S. Code, Title 49, Section 93.

SEC. 13. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Lost, Stolen, or Destroyed Bill—Delivery of Goods Under Order of Court.

U. S. Code, Title 49, Section 94.

SEC. 14. That where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such

delivery from any liability or loss incurred by reason of the origin bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: *Provided,* a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Liability Under "Duplicates."

U. S. Code, Title 49, Section 96.

SEC. 15. That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed,* plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Carrier's Title to Goods.

U. S. Code, Title 49, Section 98.

SEC. 16. That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Conflicting Claimants.

U. S. Code, Title 49, Section 97.

SEC. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Carrier May Decline to Deliver Goods Until Adverse Claim Disposed Of.

U. S. Code, Title 49, Section 98.

SEC. 18. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the

* So in original.

goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Defenses Against Holders of Bills—Claim of Third Person.

U. S. Code, Title 49, Section 99.

SEC. 19. That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

When Goods Are Loaded by a Carrier.

U. S. Code, Title 49, Section 100.

SEC. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

When Goods Are Loaded by a Shipper—Conditions—Shipper's Scales.

U. S. Code, Title 49, Section 101.

SEC. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or

condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carrier shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Liability of Carrier Issuing Bill for Goods Not Received, Misdescribed or Received Later than Date Stated.

U. S. Code, Title 49, Section 102.

SEC. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue. (As amended March 4, 1927.)

Garnishment.

U. S. Code, Title 49, Section 103.

SEC. 23. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Injunction.

U. S. Code, Title 49, Section 104.

SEC. 24. That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Carrier's Lien.

U. S. Code, Title 49, Section 105.

SEC. 25. That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

Bill for Goods Sold Under Carrier's Lien.

U. S. Code, Title 49, Section 106.

SEC. 26. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner

of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

Order Bill Endorsed in Blank—Negotiation by Delivery.

U. S. Code, Title 49, Section 107.

SEC. 27. That an order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

Negotiation by Endorsement.

U. S. Code, Title 49, Section 108.

SEC. 28. That an order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Existing Equities Upon Transfer of Straight Bill.

U. S. Code, Title 49, Section 109.

SEC. 29. That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Order Bill Negotiable by Possessor.

U. S. Code, Title 49, Section 110.

SEC. 30. That an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Title Acquired by Transferee of Order Bill.

U. S. Code, Title 49, Section 111.

SEC. 31. That a person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Transferee's Title—Notification to Carrier—Lawful Notification.

U. S. Code, Title 49, Section 112.

SEC. 32. That a person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

Compelling Indorsement.

U. S. Code, Title 49, Section 113.

SEC. 33. That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Warranties.

U. S. Code, Title 49, Section 114.

SEC. 34. That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Liability of Indorser.

U. S. Code, Title 49, Section 115.

SEC. 35. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Pledgee's Warranty.

U. S. Code, Title 49, Section 116.

SEC. 36. That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Validity of Negotiations for Value Given in Good Faith Without Notice of Fraud, Etc.

U. S. Code, Title 49, Section 117.

SEC. 37. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to

whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Goods Sold, Mortgaged or Pledged—Subsequent Negotiation of Order Bill.

U. S. Code, Title 49, Section 118.

SEC. 38. That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Seller's Lien—Stoppage in Transit.

U. S. Code, Title 49, Section 119.

SEC. 39. That where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Rights of Lien Holder.

U. S. Code, Title 49, Section 120.

SEC. 40. That, except as provided in section thirty-nine, nothing in this act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Forging or Counterfeiting Bills—Penalty.

U. S. Code, Title 49, Section 121.

SEC. 41. That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5,000, or both.

Definitions.

U. S. Code, Title 49, Section 122.

SEC. 42. First.* That in this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this act.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

* So in original; there is no "Second."

To "purchase" includes to take as mortgagee and to take as pledgee.

"State" includes any Territory, District, insular possession, or isthmian possession.

Not Retroactive.

U. S. Code, Title 49, Section 123.

SEC. 43. That the provisions of this act do not apply to bills made and delivered prior to the taking effect thereof.

Sections Severable.

U. S. Code, Title 49, Section 124.

SEC. 44. That the provisions and each part thereof and the sections and each part thereof of this act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Effective Date, Jan. 1, 1917.

SEC. 45. That this act shall take effect and be in force on and after the first day of January next after its passage.

Approved by the President, August 29, 1916.

Amendment approved by the President, March 4, 1927.

Customs Requirements.

Act of Sept. 21, 1922, c. 356, Title IV, § 484 (c); 42 Stat. at L. 960; 19 U. S. Code 347.

ENTRY OF MERCHANDISE; BILL OF LADING TO BE PRODUCED.—The consignee shall produce the bill of lading at the time of making entry, except that (1) if the Collector is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to the Collector may be accepted in lieu thereof, and (2) [paraphrased] [merchandise may be released upon a bond conditioned to hold the Collector harmless].

Liens for Freight, Charges, or General Average Contribution.

Act of Sept. 21, 1922, c. 356, Title IV, § 564; 42 Stat. at L. 978; 19 U. S. Code 465.

[Upon notice in writing of the existence of a lien upon imported merchandise in the possession of the Collector, delivery shall be refused until such liens are discharged or satisfied.]

CANADIAN WATER CARRIAGE OF GOODS ACT, 1936.

1 Edw. 8 ch. 49.

Assented to, 23 June 1936.

Proclaimed by Order in Council (No. 1623), 2 July, 1936.

Published in the Canada Gazette, 13 July, 1936.

Effective August 1, 1936.

Again proclaimed by Order in Council (No. 343), 14 February, 1939.

DOMINION OF CANADA.

1st Session, 18th Parliament, I Edward VIII, 1936.

An Act respecting the Carriage of Goods by Water.

HIS MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short Title.

1. This Act may be cited as *The Water Carriage of Goods Act, 1936.*

Rules Relating to Bills of Lading.

2. Subject to the provisions of this Act, the Rules relating to bills of lading as contained in the Schedule to this Act (hereinafter refered to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

Contract Not to Imply Seaworthy Ship.

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Documents of Title Subject to the Rules.

4. Every bill of lading, or similar document of title issued in Canada which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

Article VI of Rules—Coasting Trade.

5. Article VI of the Rules shall, in relation to the carriage of goods by water in ships carrying goods from any port or place in Canada to any other port or place in Canada, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

Weight of Bulk Cargo.

6. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

This Act Not to Affect Sections 456, 457 and 649-658 of 1934; c. 44, or Other Act Limiting Liability of Owner of Vessel.

7. (1) Nothing in this Act shall affect the operation of sections four hundred and fifty-six and four hundred and fifty-seven, and sections six hundred and forty-nine to six hundred and fifty-eight, both inclusive, of the *Canada Shipping Act, 1934*,* as amended, or the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

Date of Application of Rules to Contracts to be Fixed by O. in C.

(2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six,† as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

* Text at Appendix D.

† Proclaimed effective August 1, 1936; see two texts at page 38.

Repeal of Act of 1910-1927.

8. The *Water Carriage of Goods Act*, chapter two hundred and seven of the Revised Statutes of Canada, 1927, is hereby repealed.

Coming Into Force.

9. This Act shall come into force on a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette*.*

SCHEDULE

RULES RELATING TO BILLS OF LADING

(The Hague Rules).

ARTICLE I.

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(*a*) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

(*b*) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

(*c*) "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

(*d*) "ship" means any vessel used for the carriage of goods by water;

(*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

ARTICLE II.

RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading,

* See note on p. 30.

handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Article III.

RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;
(*b*) properly man, equip, and supply the ship;
(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things,

(*a*) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
(*b*) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
(*c*) the apparent order and condition of the goods;

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

Article III.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*), and (*c*).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity, shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV.

RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
(*b*) fire, unless caused by the actual fault or privity of the carrier;
(*c*) perils, danger, and accidents of the sea or other navigable waters;
(*d*) act of God;
(*e*) act of war;
(*f*) act of public enemies;
(*g*) arrest or restraint of princes, rulers or people, or seizure under legal process;
(*h*) quarantine restrictions;
(*i*) act or omission of the shipper or owner of the goods, his agent or representative;

(*j*) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
(*k*) riots and civil commotions;
(*l*) saving or attempting to save life or property at sea;
(*m*) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
(*n*) insufficiency of packing;
(*o*) insufficiency or inadequacy of marks;
(*p*) latent defects not discoverable by due diligence;
(*q*) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value

thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Article V.

SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article VI.

SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants

or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

Article VII.

LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by water.

Article VIII.

LIMITATION OF LIABILITY.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of vessels*

Article IX.

The monetary units mentioned in these Rules are to be taken to be lawful money of Canada.

* See Appendix D.

PRIVY COUNCIL OF CANADA.

P. C. 1623.

Minute of a Meeting of the Committee of the Privy Council, approved by The Deputy of His Excellency the Governor General on the 2nd July, 1936.

The Committee of the Privy Council, on the recommendation of the Minister of Marine, advise that The Water Carriage of Goods Act, Chapter 49 of the Statutes of 1936, be proclaimed effective the 1st August, 1936, and that a *Proclamation* do forthwith issue accordingly.

H. W. LOTHROP,

Asst. Clerk of the Privy Council.

P. C. 343.

At the Government House in Ottawa.
Tuesday, the 14th day of February, 1939.
Present: His Excellency, the Governor General in Council:

WHEREAS, under the provisions of Order in Council P. C. 1623 of July 2nd, 1936, authority was given for the proclamation of The Water Carriage of Goods Act, 1936, effective as of August 1st, 1936;

AND WHEREAS Section 7, subsection (2) of the said Act reads as folllows:

> "7. (2). The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, 1936, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid."

AND WHEREAS it is deemed expedient to determine, pursuant to Section 7, subsection (2) of the said Act, that the Rules contained in the Schedule to the said Act shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued in pursuance of any such contract;

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, is pleased to direct and doth hereby order and direct that the Rules contained in the Schedule to The Water Carriage of Goods Act, 1936, shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued, whether before or after February 15th, 1939, in pursuance of any such contract.

E. J. LEMAIRE,

Clerk of the Privy Council.

NEWFOUNDLAND ACT

To Amend the Law with Respect to

THE CARRIAGE OF GOODS BY SEA

22 Geo. 5, Ch. 18.

Enacted on April 30, 1932, Effective June 30, 1932.

THE DOMINION OF NEWFOUNDLAND

AN ACT TO AMEND THE LAW WITH RESPECT TO THE CARRIAGE OF GOODS BY SEA.

SECTION

1. Application of Rules in Schedule.
2. Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply.
3. Statement as to application of Rules to be included in Bills of Lading.
4. Modification of Article VI of Rules in relation to coasting trade and trade to Canada.
5. Modification of Rules 4 and 5 of Act III in relation to bulk cargoes.
6. Short Title, saving and operation.
7. Newfoundland Courts to have jurisdiction.
8. Repeal. Schedule.

WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading:

AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference:

AND WHEREAS it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act (in this Act referred to as "the Rules") should, subject to the provisions of this Act, be given the force of law with a view to establishing the

responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading.

Be it therefore enacted by the Governor, the Legislative Council and House of Assembly, in Legislative Session convened, as follows:

Application of Rules in Schedule.

1. Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.

Absolute Warranty of Seaworthiness not to be Implied in Contracts to which Rules Apply.

2. There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Statement as to Application of Rules to be Included in Bills of Lading

3. Every bill of lading, or similar document of title, issued in this Dominion which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.*

Modification of Article VI of Rules in Relation to Coasting Trade and Trade to Cape Breton.

4. Article VI of the Rules shall, in relation to the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port in this Dominion or from Channel or Port aux Basques to any port in the Island of Cape Breton have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

* This statement is not essential; *The Hurry On* (*Vita Food Products, Inc.* vs. *Unus Shipping Co., Ltd.*), 1938 A. M. C. 159, (1938) 2 Dominion L. R. 372, 383 (Nova Scotia Supreme Court), appeal dismissed, 1939 A. M. C. 257, 63 Lloyds L. R. 21, [1939] A. C. 277 (Privy Council).

Modification of Rules 4 and 5 of Act III in Relation to Bulk Cargoes.

5. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Short Title.

6. (1) This Act may be cited as the Carriage of Goods by Sea Act, 1932.

Other Statutes Not Affected.

(2) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894,* as amended by any subsequent enactment or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels.

Effective Date.

(3) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea made before the 30th day of June, 1932, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

Newfoundland Courts to have Jurisdiction.

7. Any Court in Newfoundland having jurisdiction to the amount claimed shall have power to try any action for loss of or damage to goods carried by sea to or from this Dominion, and such action may be commenced and continued to judgment and execution, anything in any Bill of Lading, receipt or other similar document to the contrary notwithstanding.

* I. e., the British Merchant Shipping Act, 1894.

Repeal.

8. Chapter 187 of the Consolidated Statutes (Third Series), entitled "Of the Liability of Carriers by Water," is hereby repealed in respect to any contract for the carriage of goods by sea made after the 30th day of June, 1932, and to any Bill of Lading or similar document of title issued in pursuance of any such contract.

SCHEDULE.

[NOTE: Here follows the Schedule.

The Schedule contains the Hague Rules precisely like the Schedule of the British Act of 1924, except that the figure £100 in Article IV (5) is replaced by the figure $500. It is also precisely like the text of the Schedule of the Canadian Act, page 31, *supra, except that it contains the gold clause,* which the Canadian Act deletes.

The text of the Schedule of the British Act of 1924 will be found at 1924 American Maritime Cases 1338; in POOR on *Charter parties,* 2nd edition (1930), page 309; in the current volumes of Lloyds Calendar; and in the recent editions of Scrutton (1939), Carver (1938), and Temperley (1932)].

CONVENTION INTERNATIONALE

POUR L'UNIFICATION DE CERTAINES RÈGLES
EN MATIÈRE DE CONNAISSEMENT
SIGNÉE À BRUXELLES, LE 25 AOÛT 1924.

U. S. Treaty Series No. 931.*
U. S. Statutes at Large, Volume 51, page 233.
League of Nations Treaty Series, Volume 120, pages 155, 157, 183.

Le Président de la République Allemande, le Président de la République Argentine, sa Majesté le Roi des Belges, le Président de la République du Chili, le Président de la République de Cuba, sa Majesté le Roi de Danemark et d'Islande, sa Majesté le Roi d'Espagne, le Chef de l'État Estonien, le Président des États-Unis d'Amérique, le Président de la République de Finlande, le Président de la République Française, sa Majesté le Roi du Royaume-Uni de Grande-Bretagne et d'Irlande et des Possessions Britanniques au dela des Mers, Empereur des Indes, son Altesse Sérénissime le Gouverneur du Royaume de Hongrie, sa Majesté le Roi d'Italie, sa Majesté l'Empereur du Japon, le Président de la République de Lettonie, le Président de la République du Mexique, sa Majesté le Roi de Norvége, sa Majesté la Reine des Pays-Bas, le Président de la République du Pérou, le Président de la République de Pologne, le Président de la République Portugaise, sa Majesté le Roi de Roumanie, sa Majesté le Roi des Serbes, Croates et Slovénes, sa Majesté le Roi de Suéde et le Président de la République de l'Uruguay.

Ayant reconnu l'utilité de fixer de commun accord certaines régles uniformes en matière de connaissement, ont décidé de conclure une Convention à cette effet et ont désigné, pour Leurs Plénipotentiaires, savoir:

[*Translation:* Having recognized the utility of laying down in common accord certain uniform rules relating to bills of lading, have decided to conclude a convention to that effect and have designated as their Plenipotentiaries, namely:

[The List of attending Diplomatic Plenipotentiaries of fourteen out of twenty-six participating States is here omitted, since the same persons appear as the Signers of the Convention at pp. 62, 64.]

Lesquels, à ce dûment autorisés, sont convenus de ce qui suit:

[Who, duly authorized therefor have agreed on the following:]

* The official text is in French and the Belgian Government is custodian.

ARTICLE PREMIER.

Dans la présente Convention les mots suivants sont employés dans le sens précis indiqué ci-dessous:

(a) " Transporteur " comprend le propriétaire du navire ou l'affréteur, partie à un contrat de transport avec un chargeur.

(b) " Contrat de transport " s'applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par mer; il s'applique également au connaissement ou document similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement.

(c) " Marchandises " comprend biens, objets, marchandises et articles de nature quelconque, à l'exception des animaux vivants et de la cargaison qui, par le contrat de transport, est déclarée comme mise sur le pont et, en fait, est ainsi transportée.

(d) " Navire " signifie tout bâtiment employé pour le transport des marchandises par mer.

(e) " Transport de marchandises " oeuvre le temps écoulé depuis le chargement des marchandises à bord du navire jusqu'à leur déchargement du navire.

ARTICLE 2.

Sous réserve des dispositions de l'article 6, le transporteur dans tous les contrats de transport des marchandises par mer sera, quant au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des dites marchandises, soumis aux responsabilités et obligations, comme il bénéficiera des droits et exonérations ci-dessous énoncés.

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO (OCEAN) BILLS OF LADING.

(Translation by the State Department)

ARTICLE I.—DEFINITIONS.

In this convention the following words are employed with the meanings set out below:

(a) " Carrier " includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper.

(b) " Contract of carriage " applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

(c) " Goods " includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) " Ship " means any vessel used for the carriage of goods by sea.

(e) " Carriage of goods " covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE II.—RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE 3.

1. Le transporteur sera tenu avant et au début du voyage d'exercer une diligence raisonnable pour:

(a) Mettre le navire en état de navigabilité;
(b) Convenablement armer, équiper et approvisionner le navire;
(c) Approprier et mettre en bon état les cales, chambres froides et frigorifiques et toutes autres parties du navire où des marchandises sont chargées pour leur réception, transport et conservation.

2. Le transporteur, sous réserve des dispositions de l'article 4, procédera de façon appropriée et soigneuse au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des marchandises transportées.

3. Après avoir reçu et pris en charge les marchandises, le transporteur ou le capitaine ou agent du transporteur devra, sur demande du chargeur, délivrer au chargeur un connaissement portant entre autres choses:

(a) Les marques principales nécessaires à l'identification des marchandises telles qu'elles sont fournies par écrit par le chargeur avant que le chargement de ces marchandises ne commence, pourvu que ces marques soient imprimées ou apposées clairement de toute autre façon sur les marchandises non emballées ou sur les caisses ou emballages dans lesquelles les marchandises sont contenues, de telle sorte qu'elles devraient normalement rester lisibles jusqu'à la fin du voyage;

(b) Ou le nombre de colis, ou de pièces, ou la quantité ou le poids, suivant les cas, tels qu'ils sont fournis par écrit par le chargeur;

(c) L'état et le conditionnement apparent des marchandises.

Cependant aucun transporteur, capitaine ou agent du transporteur, ne sera tenu de déclarer ou de mentionner, dans le connaissement des marques, un nombre, une quantité ou un poids, dont il a une raison sérieuse de soupçonner qu'ils ne représentent pas exactement les marchandises actuellement reçues par lui, ou qu'il n'a pas eu des moyens raisonnables de vérifier.

4. Un tel connaissement vaudra présomption, sauf preuve contraire, de la réception par le transporteur des marchandises telles qu'elles y sont décrites conformément au § 3, a), b) et c).

ARTICLE III.—RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;
(b) Properly man, equip, and supply the ship;
(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

2. Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
(c) The apparent order and condition of the goods;

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. Le chargeur sera considéré avoir garanti au transporteur, au moment du chargement, l'exactitude des marques, du nombre, de la quantité et du poids tels qu'ils sont fournis par lui, et le chargeur indemnisera le transporteur de toutes pertes, dommages et dépenses provenant ou résultant d'inexactitudes sur ces points. Le droit du transporteur à pareille indemnité ne limitera d'aucune façon sa responsabilité et ses engagements sous l'empire du contrat de transport vis-à-vis de toute personne autre que le chargeur.

6. A moins qu'un avis des pertes ou dommages et de la nature générale de ces pertes ou dommages ne soit donné par écrit au transporteur où à son agent au port de déchargement, avant ou au moment de l'enlèvement des marchandises, et de leur remise sous la garde de la personne ayant droit à la délivrance sous l'empire du contrat de transport, cet enlèvement constituera, jusqu'à preuve contraire, une présomption que les marchandises ont été délivrées par le transporteur telles qu'elles sont décrites au connaissement.

Si les pertes ou dommages ne sont pas apparents, l'avis doit être donné dans les trois jours de la délivrance.

Les réserves écrites sont inutiles si l'état de la marchandise a été contradictoirement constaté au moment de la réception.

En tous cas le transporteur et le navire seront déchargés de toute responsabilité pour pertes ou dommages à moins qu'une action ne soit intentée dans l'année de la délivrance des marchandises ou de la date à laquelle elles eussent dû être délivrées.

En cas de perte ou dommage certains ou présumés, le transporteur et le réceptionnaire se donneront réciproquement toutes les facilités raisonnables pour l'inspection de la marchandise et la vérification du nombre de colis.

7. Lorsque les marchandises auront été chargées, le connaissement que délivrera le transporteur, capitaine ou agent du transporteur, au chargeur sera, si le chargeur le demande, un connaissement libellé "Embarqué" pourvu que, si le chargeur a auparavent reçu quelque document donnant droit à ces marchandises, il restitue ce document contre remise d'un connaissement "Embarqué." Le transporter, le capitaine ou l'agent aura également la faculté d'annoter au port d'embarquement, sur le document remis en premier lieu, le ou les noms du ou des navires sur lesquels les marchandises ont été embarquées et la date ou les dates de l'embarquement, et lorsque ce document sera ainsi

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in para-

annoté, il sera, s'il contient les mentions de l'article 3, § 3, considéré aux fins de cet article comme constituant un connaissement libellé " Embarqué."

8. Toute clause, convention ou accord dans un contrat de transport exonérant le transporteur ou le navire de responsabilité pour perte ou dommage concernant des marchandises provenant de négligence, faute ou manquement aux devoirs ou obligations édictées dans cet article ou atténuant cette responsabilité autrement que ne le prescrit la présente Convention, sera nulle, non avenue et sans effet. Une clause cédant le bénéfice de l'assurance au transporteur ou toute clause semblable sera considérée comme exonérant le transporteur de sa responsabilité.

ARTICLE 4.

1. Ni le transporteur ni le navire ne seront responsables des pertes ou dommages provenant ou résultant de l'état d'innavigabilité, à moins qu'il ne soit imputable à un manque de diligence raisonnable de la part du transporteur à mettre le navire en état de navigabilité ou à assurer au navire un armement, équipment ou approvisionnement convenables, ou à approprier et mettre en bon état les cales, chambres froides et frigorifiques et toutes autres parties du navire où des marchandises sont chargées, de façon qu'elles soient aptes à la réception, au transport et à la préservation des marchandises, le tout conformément aux prescriptions de l'article 3, § 1er. Toutes les fois qu'une perte ou un dommage aura résulté de l'innavigabilité, le fardeau de la preuve en ce qui concerne l'exercice de la diligence raisonnable tombera sur le transporteur ou sur toute autre personne se prévalant de l'exonération prévue au présent article.

2. Ni le transporteur ni le navire ne seront responsables pour perte ou dommage résultant ou provenant:

(a) Des actes, négligence ou défaut du capitaine, marin, pilote ou des préposés du transporteur dans la navigation ou dans l'administration du navire;

(b) D'un incendie, à moins qu'il ne soit causé par le fait ou la faute du transporteur:

(c) Des périls, dangers ou accidents de la mer ou d'autres eaux navigables;

(d) D'un " acte de Dieu ";

(e) De faits de guerre;

graph 3 of Article III, it shall for the purpose of this article be deemed to constitute a " shipped " bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.—RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers, and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Du fait d'ennemis publics;

(g) D'un arrêt ou contrainte de prince, autorités ou peuple, ou d'une saisie judiciaire;

(h) D'une restriction de quarantaine;

(i) D'un acte ou d'une omission du chargeur ou propriétaire des marchandises, de son agent ou représentant;

(j) De grèves ou lock-outs ou d'arrêts ou entraves apportés au travail, pour quelque cause que ce soit, partiellement ou complètement;

(k) D'émeutes ou de troubles civils;

(l) D'un sauvetage ou tentative de sauvetage de vies ou de biens en mer;

(m) De la freinte en volume ou en poids ou de toute autre perte ou dommage résultant de vice caché, nature spéciale ou vice propre de la marchandise;

(n) D'une insuffisance d'emballage;

(o) D'une insuffisance ou imperfection de marques;

(p) De vices cachés échappant à une diligence raisonnable;

(q) De toute autre cause ne provenant pas du fait ou de la faute du transporteur ou du fait ou de la faute des agents ou préposés du transporteur, mais le fardeau de la preuve incombera à la personne réclamant le bénéfice de cette exception et il lui appartiendra de montrer que ni la faute personnelle ni le fait du transporteur ni la faute ou le fait des agents ou préposés du transporteur n'ont contribué à la perte ou au dommage.

3. Le chargeur ne sera pas responsable des pertes ou dommages subis par le transporteur ou le navire et qui proviendraient ou résulteraient de toute cause quelconque sans qu'il y ait acte, faute ou négligence du chargeur, de ses agents ou de ses préposés.

4. Aucun déroutement pour sauver ou tenter de sauver des vies ou des biens en mer, ni aucun déroutement raisonnable ne sera considéré comme une infraction à la présente Convention ou au contrat de transport, et le transporteur ne sera responsable d'aucune perte ou dommage en résultant.

5. Le transporteur comme le navire ne seront tenus en aucun cas des pertes ou dommages causés aux marchandises ou les concernant pour une somme dépassant 100 liv. sterl. par colis ou unité, ou l'équivalent de cette somme en une autre monnaie, à moins que la

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers, or people or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent, or representative.

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling * per package or unit or

* The First Understanding (p. 67, infra) declares that the corresponding amount shall be $500 lawful money of the United States. See also Article IX, p. 59, infra; and Section 4 (5) of the Act of April 15, 1936, p. 7, supra.

nature et la valeur de ces marchandises n'aient été déclarées par le chargeur avant leur embarquement et que cette déclaration ait été insérée au connaissement.

Cette déclaration ainsi insérée dans le connaissement constituera une présomption, sauf preuve contraire, mais elle ne liera pas le transporteur, qui pourra la contester.

Par convention entre le transporteur, capitaine ou agent du transporteur et le chargeur, une somme maximum différente de celle inscrite dans ce paragraphe peut être déterminée, pourvu que ce maximum conventionnel ne soit pas inférieur au chiffre ci-dessus fixé.

Ni le transporteur ni le navire ne seront en aucun cas responsables pour perte ou dommage causé aux marchandises ou les concernant, si dans le connaissement le chargeur a fait sciemment une déclaration fausse de leur nature ou de leur valeur.

6. Les merchandises de nature inflammable, explosive ou dangereuse, à l'embarquement desquelles le transporteur, le capitaine ou l'agent du transporteur n'auraient pas consenti, en connaissant leur nature ou leur caractère, pourront à tout moment, avant déchargement, être débarquées à tout endroit ou détruites ou rendues inoffensives par le transporteur sans indemnité et le chargeur de ces marchandises sera responsable de tout dommage et dépenses provenant ou résultant directement ou indirectement de leur embarquement. Si quelqu'une de ces marchandises embarquées à la connaissance et avec le consentement du transporteur devenait un danger pour le navire ou la cargaison, elle pourrait de même façon être débarquée ou détruite ou rendue inoffensive par le transporteur, sans responsabilité de la part du transporteur si ce n'est du chef d'avaries communes, s'il y a lieu.

Article 5.

Un transporteur sera libre d'abandonner tout ou partie de ses droits et exonérations ou d'augmenter ses responsabilités et obligations tels que les uns et les autres sont prévus par la présente Convention, pourvu que cet abandon ou cette augmentation soit inséré dans le connaissement délivré au chargeur.

Aucune disposition de la présente Convention ne s'applique aux chartes-parties; mais si des connaissements sont émis dans le cas d'un navire sous l'empire d'une charte-partie, ils sont soumis aux termes de la présente Convention. Aucune disposition dans ces régles ne sera considérée comme empêchant l'insertion dans un connaissement d'une disposition licite quelconque au sujet d'avaries communes.

the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima* facie evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Article V.—Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and liabilities under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article 6.

Nonobstant les dispositions des articles précédents, un transporteur, capitaine ou agent du transporteur et un chargeur seront libres, pour des marchandises déterminées, quelles qu'elles soient, de passer un contrat quelconque avec des conditions quelconques concernant la responsabilité et les obligations du transporteur pour ces marchandises, ainsi que les droits et exonérations du transporteur au sujet de ces mêmes marchandises, ou concernant ses obligations quant à l'état de navigabilité du navire dans la mesure où cette stipulation n'est pas contraire à l'ordre public, ou concernant les soins ou diligence de ses préposés ou agents quant au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des marchandises transportées par mer, pourvu qu'en ce cas aucun connaissement n'ait été ou ne soit émis et que les conditions de l'accord intervenu soient insérées dans un récépissé qui sera un document non négociable et portera mention de ce caractère.

Toute convention ainsi conclue aura plein effet légal.

Il est toutefois convenue que cet article ne s'appliquera pas aux cargaisons commerciales ordinaires, faites au cours d'opérations commerciales ordinaires, mais seulement à d'autres chargements où le caractére et la condition des biens à transporter et les circonstances, les termes et les conditions auxquels le transport doit se faire sont de nature à justifier une convention spéciale.

Article 7.

Aucune disposition de la présente Convention ne défend à un transporteur ou à un chargeur d'insérer dans un contrat des stipulations, conditions, réserves ou exonérations relatives aux obligations et responsabilités du transporteur ou du navire pour la perte ou les dommages survenant aux marchandises, ou concernant leur garde, soin et manutention, antérieurement au chargement et postérieurement au déchargement du navire sur lequel les marchandises sont transportées par mer.

Article 8.

Les dispositions de la présente Convention ne modifient ni les droits ni les obligations du transporteur tels qu'ils résultent de toute loi en vigueur en ce moment relativement à la limitation de la responsabilité des propriétaires de navires de mer.

Article VI.—Special Conditions.

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Article VII.—Limitations on the Application of the Rules.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

Article VIII.—Limitation of Liability.

The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.*

* See Appendices C and D.

ARTICLE 9.

Les unités monétaires dont il s'agit dans la présente Convention s'entendent valeur or.

Ceux des États contractants où la livre sterling n'est pas employée comme unité monétaire se réservent le droit de convertir en chiffres ronds, d'après leur système monétaire, les sommes indiquées en livres sterling dans la présente Convention.

Les lois nationales peuvent réserver au débiteur la faculté de se libérer dans la monnaie nationale, d'après le cours du change au jour de l'arrivée du navire au port de déchargement de la marchandise dont il s'agit.

ARTICLE 10.

Les dispositions de la présente Convention s'appliqueront à tout connaissement créé dans un des États contractants.

ARTICLE 11.

A l'expiration du délai de deux ans au plus tard à compter du jour de la signature de la Convention, le Gouvernement belge entrera en rapport avec les Gouvernements des Hautes Parties contractantes qui se seront déclarées prêtes à la ratifier, à l'effet de faire décider s'il y a lieu de la mettre en vigueur. Les ratifications seront déposées à Bruxelles à la date qui sera fixée de commun accord entre les dits Gouvernements. Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des États qui y prendront part et par le Ministre des Affaires Étrangères de Belgique.

Les dépôts ultérieurs se feront au moyen d'une notification écrite, adressée au Gouvernement belge et accompagnée de l'instrument de ratification.

ARTICLE IX.

The monetary units mentioned in this convention are to be taken to be gold value.*

Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.†

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

ARTICLE X.

The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.‡

ARTICLE XI.

After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

* The effect of this provision is nullified by the declaration of the First Understanding, p. 67, infra.

† Congress has declared the equivalent to be $500 lawful money of the United States. See Section 4 (5) of the Act of April 15, 1936, p. 7, supra.

‡ The declaration of the Second Understanding is that in the event of a conflict, the text of the Act of April 15, 1936, shall prevail over the text of the Convention. The Act applies only to bills of lading in foreign commerce; hence the Convention also applies only to foreign commerce, and not to domestic commerce.

Copie certifiée conforme au procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification qui les accompagnent sera immédiatement, par les soins du Gouvernement belge et par la voie diplomatique, remise aux États qui ont signé la présente Convention ou qui auront adhéré. Dans les cas visés à l'alinéa précédent, ledit Gouvernement fera connaître, en même temps, la date à laquelle il a reçu la notification.

Article 12.

Les États non signataires pourront adhérer à la présente Convention, qu'ils aient été ou non représentés à la Conférence internationale de Bruxelles.

L'État qui désire adhérer notifie par écrit son intention au Gouvernement belge, en lui transmettant l'acte d'adhésion, qui sera déposé dans les archives du dit Gouvernement.

Le Gouvernement belge transmettra immédiatement à tous les États signataires ou adhérents copie certifiée conforme de la notification ainsi que de l'acte d'adhésion en indiquant la date à laquelle il a reçu la notification.

Article 13.

Les Hautes Parties contractantes peuvent, au moment de la signature, du dépôt des ratifications ou lors de leur adhésion, déclarer que l'acceptation qu'elles donnent à la présente Convention ne s'applique pas soit à certains soit à aucun des Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer, se trouvant sous leur souveraineté ou autorité. En conséquence, elles peuvent ultérieurement adhérer séparément au nom de l'un ou de l'autre de ces Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer, ainsi exclus dans leur déclaration originale. Elles peuvent aussi, en se conformant à ces dispositions, dénoncer la présente Convention séparément pour l'un ou plusieurs des Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer se trouvant sous leur souveraineté ou autorité.

Article 14.

A l'égard des États qui auront participé au premier dépôt de ratifications, la présente Convention produira effet un an après la date

A duly certified copy of the proces-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article XII.

Nonsignatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article XIII.

The high contracting parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate, or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

Article XIV.

The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year

du procès-verbal de ce dépôt. Quant aux États qui la ratifieront ultérieurement ou qui y adhéreront, ainsi que dans les cas où la mise en vigueur se fera ultérieurement et selon l'article 13, elle produira effet six mois après que les notifications prévues à l'article 11, alinéa 2, et à l'article 12, alinéa 2, auront été reçues par le Gouvernement belge.

ARTICLE 15.

S'il arrivait qu'un des États contractants voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement belge, qui communiquera immédiatement copie certifiée conforme de la notification à tous les autres États, en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation produira ses effets à l'égard de l'État seul qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement belge.

ARTICLE 16.

Chaque État contractant aura la faculté de provoquer la réunion d'une nouvelle conférence, dans le but de rechercher les améliorations qui pourraient être apportées à la présente Convention.

Celui des États qui ferait usage de cette faculté aurait à notifier un an à l'avance son intention aux autres États, par l'intermédiaire du Gouvernement belge, qui se chargerait de convoquer la conférence.

Fait à Bruxelles, en un seul exemplaire, le 25 août 1924.

Pour l'Allemagne:
(signé) KELLER.
Pour la Belgique:
(signé) LOUIS FRANCK,
(signé) ALBERT LE JEUNE,
(signé) SOHR.
Pour le Chili:
(signé) ARMANDO QUEZADA.
Pour l'Espagne:
(signé) EL MARQUES DE VILLALOBAR.
Pour l'Estonie:
(signé) PUSTA.
Pour les États-Unis d'Amérique:
(signé) WILLIAM PHILLIPS.
Pour la France:
(signé) MAURICE HERBETTE.
Pour la Grande-Bretagne:
(signé) GEORGE GRAHAME.
Pour la Hongrie:
(signé) WORACZICZKY.
Pour l'Italie:
(signé) GIULIO DANEO.
Pour le Japon:
Sous les réserves formulés dans le note relative à ce traité et jointe à ma lettre, datée du 25 août 1925, à S. Exc. M. ÉMILE VANDEVELDE, Ministre des Affaires Étrangères de Belgique.
(signé) M. ADATCI.

after the date of the proces-verbal recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with Article XIII, it shall take effect six months after the notifications specified in paragraph 2 of Article XI, and paragraph 2 of Article XII, have been received by the Belgian Government.

ARTICLE XV.

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

ARTICLE XVI.

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the conference.

Done at Brussels, in a single copy, August 25, 1924.

Signatures, ad referendum: Chile,* Estonia,* France, Germany, Great Britain. Hungary, Italy, Japan,* with reservations, Poland and Danzig, Rumania, Spain, United States of America, Yugoslavia.* The names of the individual signers appear on the opposite page.

* Not yet (1940) implemented by ratification.

Pour la Pologne et la Ville Libre de Dantzig:
(signé) SZEMBEK.
Pour la Roumanie:
(signé) HENRY CARTAGI.
Pour le Royaume des Serbes, Croates et Slovènes:
(signé) Dr. MILORAD STRAZNICKY,
(signé) Dr. VERONA.

PROTOCOLE DE SIGNATURE.

En procédant à la signature de la Convention internationale pour l'unification de certaines règles en matière de connaissement, les Plénipotentiaires soussignés ont adopté le présent protocole qui aura la même valeur que si ses dispositions étaient insérées dans le texte même de la Convention à laquelle il se rapporte.

Les Hautes Parties contractantes pourront donner à effet à cette Convention, soit en lui donnant force de loi, soit en introduisant dans leur législation nationale les règles adoptées par la Convention sous une forme appropriée à cette législation.

Elles se réservent expressément le droit:

1° De préciser que, dans les cas prévus par l'article 4, alinéa 2, de *c*) à *p*), le porteur du connaissement peut établir la faute personnelle du transporteur ou les fautes de ses proposés * non couverts par le paragraphe *a*);

2° D'appliquer en ce qui concerne le cabotage national l'article 6 à toutes catégories de marchandises, sans tenir compte de la restriction figurant au dernier alinéa du dit article.

Fait à Bruxelles, en un seul exemplaire, le 25 août 1924.

Pour l'Allemagne:
(signé) KELLER.
Pour la Belgique:
(signé) LOUIS FRANCK,
(signé) ALBERT LE JEUNE,
(signé) SOHR.
Pour le Chili:
(signé) ARMANDO QUEZADA.
Pour l'Espagne:
(signé) EL MARQUES DE VILLALOBAR.
Pour l'Estonie:
(signé) PUSTA.
Pour les États-Unis d'Amérique:
(signé) WILLIAM PHILLIPS.
Pour la France:
(signé) MAURICE HERBETTE.

* So in original; the word should be *préposés*.

Protocol of Signature.

In proceeding to the signature of the international convention for the unification of certain rules relating to bills of lading, the undersigned plenipotentiaries have adopted the present protocol which will have the same validity as if the provisions thereof were inserted in the very text of the convention to which it refers.*

The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation, the rules adopted under this Convention.

They may reserve the right—

1. To prescribe that in the cases referred to in paragraph 2(c) to (p) of Article 4, the holder of a bill of lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (a).

2. To apply Article 6 in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that article.

Done at Brussels, in a single copy, August 25, 1924.

* Through inadvertence, the foregoing paragraph was omitted from the copy of the English translation of the Protocol of Signature which was sent to the Senate in Executive E, 1927.

BELGIUM.

The Belgian act of ratification of June 2, 1930 was accompanied by a reservation excluding the Belgian Congo, and Ruanda-Urundi, territories under mandate.

FRANCE.

The French ratification of January 4, 1937, was accompanied by a reservation excluding the French colonies, possessions, protectorates or overseas possessions. However, it appears to include Algeria.

GREAT BRITAIN.

I, the Undersigned, His Britannic Majesty's Ambassador at Brussels, on affixing my signature to the Protocol of Signature of the International Convention for the unification of certain rules relating to Bills of Lading, on this 15th day of November 1924, hereby make the following declarations by direction of my Government.

I declare that His Britannic Majesty's Government adopt the last reservation in the additional Protocol of the Bills of Lading Convention.

I further declare that my signature applies only to Great Britain and Northern Ireland. I reserve the right of each of the British Dominions, Colonies, Overseas Possessions and Protectorates, and of each of the territories over which His Britannic Majesty exercises a mandate to accede to this Convention under Article 13.

(signé) GEORGE GRAHAME,
His Britannic Majesty's Ambassador at Brussels.

Brussels, this 15th day of November, 1924.

The act of ratification of June 2, 1930 was accompanied by the statement that it was effective only for the United Kingdom and Northern Ireland. However, on December 2, 1930 and May 3, 1932, further declarations were deposited which adhered to the Convention on behalf of all the Colonies, Protectorates and Mandated territories to which Great Britain had already extended the Rules by legislative Orders in Council and Ordinances. The full list will be found at page 76.

JAPAN.

(TRANSLATION).

At the moment of proceeding to the signature of the International Convention for the unification of certain rules relating to Bills of Lading, the undersigned, Plenipotentiary of Japan, makes the following reservations:

a) *To Article 4.*

Japan reserves to itself until further notice the acceptance of the provisions in (a) of paragraph 2 of Article 4.*

b) Japan is of the opinion that the Convention does not in any part apply to national coasting trade: consequently, there should be no occasion to make it the object of provisions in the Protocol. However, if it be not so, Japan reserves to itself the right freely to regulate the national coasting trade by its own law.

Brussels, August 25, 1925. (s) M. ADATCI.

UNITED STATES OF AMERICA.

Ratification advised and consented to April 1, 1935 (with one understanding) and May 6, 1937 (with a second understanding), and deposited June 29, 1937.

FIRST UNDERSTANDING.

Notwithstanding the provisions of article 4, section 5, and the first paragraph of article 9 of the convention, neither the carrier nor the ship shall in any event be or become liable within the jurisdiction of the United States of America for any loss or damage to or in connection with goods in an amount exceeding $500, lawful money of the United States of America, per package or unit unless the nature and value of goods have been declared by the shipper before shipment and inserted in the bill of lading.

SECOND UNDERSTANDING.

Should any conflict arise between the provisions of the Convention and the provisions of the Act of April 16, 1936, known as the "Carriage of Goods by Sea Act," the provisions of said Act shall prevail.

*** The exception of "act, neglect or default in navigation or management."**

DENMARK, FINLAND, NORWAY AND SWEDEN.
(Translation).

The adherences of Denmark, Finland Norway and Sweden to the Convention and to the Protocol of Signature annexed thereto are given subject to the reservations that the other Contracting States raise no objection to the effect of the Convention being limited in the following manner as far as concerns Denmark, Finland, Norway and Sweden—

Coasting Trade.

1. The Navigation Law of Denmark, Finland, Norway and Sweden will continue to permit, in the national coasting trade, bills of lading and similar documents to be issued in conformity with the provisions of that law, without having the provisions of the Convention applied to them or applied to the relations of the carrier and the holder of the document as therein defined.

Baltic Trade.

2. Maritime transport between Denmark, Finland, Norway and Sweden and the other Northern States whose navigation laws contain analogous provisions shall be deemed to be national coasting trade under the conditions mentioned in paragraph 1, whenever such disposition shall be directed by the terms of Article 122, last paragraph, of the Danish, Finnish, Norwegian and Swedish Navigation Law.

Railway Convention of 1933.

3. The provisions of the International Conventions Relating to the Carriage of Passengers and Baggage and Relating to the Carriage of Goods by Railway, signed at Rome, November 23, 1933, shall not be affected by this Convention.

NOTE: No objection to the acceptance of the reservations of Denmark, Norway and Sweden having been brought to the notice of the Belgian Government, custodian of the diplomatic documents, their adherences took effect as of January 1, 1939; and that of Finland on January 1, 1940.

NOTE: All four countries have a Uniform Navigation Law.

RATIFICATIONS AND ADHERENCES.

The Convention first became effective for any nation on June 2, 1931, between the first four High Contracting Parties to ratify it. These Parties are indicated in the following list by an asterisk.

Party	*Ratified or Adhered*	*Effective Date*
* Belgium	June 2, 1930	June 2, 1931
Denmark	July 1, 1938	January 1, 1939
Finland	July 1, 1939	January 1, 1940
France (excluding colonies)	January 4, 1937	July 4, 1937
Germany	July 1, 1939	January 1, 1940
* Great Britain (U. K. and Northern Ireland only)	June 2, 1930	June 2, 1931
† Great Britain, for certain Colonies, Territories and Mandates	December 2, 1930	June 2, 1931
† Great Britain, for certain other Colonies, etc.	May 3, 1932	December 3, 1932
* Hungary	June 2, 1930	June 2, 1931
Italy (excluding colonies)	October 7, 1938	April 7, 1939
Monaco	May 15, 1931	November 15, 1931
Norway	July 1, 1938	January 1, 1939
Portugal (except colonies)	December 24, 1931	June 25, 1932
Poland	October 26, 1936	April 26, 1937
Rumania	August 4, 1937	February 4, 1938
* Spain	June 2, 1930	June 2, 1931
Sweden	July 1, 1938	January 1, 1939
United States of America	June 29, 1937	December 29, 1937

NOTE: The statement in the 1937 edition that the Netherlands had ratified in 1931 was an error.

† For complete list, see page 76.

HAGUE RULES LEGISLATION IN OTHER COUNTRIES.

Great Britain, Australia, India, British Colonies, Protectorates and Mandates. The British Carriage of Goods by Sea Act, 1924, has been thoroughly treated by Temperley & Vaughan, whose volume entitled "The Carriage of Goods by Sea Act, 1924" is now in its fourth edition. It has also received similar treatment by the editors of the current editions of SCRUTTON *on Charter Parties* and of CARVER on *Carriage of Goods by Sea.* It therefore seems needless to do more than direct attention to these authoritative works. All of these Acts apply only to *outward* bills of lading; and they apply to carriage from any one part of the Empire to any other part as though the parts were foreign to each other.

Belgium. The Belgian legislature has enacted the literal wording of the French text of the Convention into the Code of Commerce; and applies it both to outward and to inward bills of lading, as we do in the United States. The £100 clause is fixed as the equivalent of 17,500 Belgian francs or 3,500 Belgas. The Belgian law does not apply to the Belgian Congo, nor to any territories under Belgian mandate.

Netherlands. The Dutch legislature has enacted generally that a bill of lading which voluntarily incorporates the Hague Rules or the Convention as a clause of the contract shall be given effect by the Courts of Holland in accordance with the Rules. However, the use of the Rules is not mandatory. Holland has not ratified the Convention. Several sections of the Maritime Code have been amended to correspond with the Rules. The law prevailing in Holland is understood to apply equally in the Netherland East Indies and in Curaçao (Netherland West Indies) and Surinam (Netherland Guiana).

France has both ratified the Convention and enacted a new domestic statute. The Convention applies as the law of the contract to every situation where any foreigner is a party to the contract, as shipper, carrier, consignee, assignee or banker, provided that he is a citizen or subject (ressortissant) of a sovereign which has ratified the Convention. Thus all foreigners of ratifying countries are assured

that their rights will be dealt with under the Convention. All other persons will be dealt with under the new French domestic statute, which is quite different from the Convention and the Rules, especially in that it is logically based, not on the idea of negligence and due diligence, but on the idea of a warranty that the goods will be safely delivered unless some excepted cause intervenes.

When the Convention was signed in 1924, £100 was 15,000 French francs. When the domestic law was passed in 1936, the equivalent was 8,000 francs, and the legislature fixed the valuation clause at that figure, with power given the Ministry to alter the figure from time to time as necessity might arise. In 1938, the commercial equivalent was 12,500 francs; and it was suggested that the Ministry should exercise its power, but it has not (1941) done so.

The French ratification of the Convention extends to Algeria, but not to any other French colonies, territories, mandates, or oversea possessions, in which the domestic legislation of April 2, 1936 presumably applies to all persons of all nationalities.

The text of the French statutes and legal articles describing their effect and operation are found in Dor: *Revue de Droit Maritime Comparé,* Tome 34, pp. 474-476 and 575-576 (1936); Tome 36, pp. 448-449 and 496 (1937); Tome 37, pp. 416-424 (1938); Tome 38, p. 1 (1938); Tome 40, p. 1 and p. 19 (1939).

Italy. While Italy took the necessary steps to ratify in 1928, and amended her Maritime Code accordingly in 1931, only the ratification has been given actual effect. The ratification was deposited on October 7, 1938 and took effect April 7, 1937, being proclaimed in the official French text. Consequently the Convention is now law in Italy by ratification and corresponding proclamation, in the exact language of the French text.

In April, 1938 Italy inquired of the U. S. State Department concerning the purport of the U. S. "Pomerene Act" understanding, and a reply was sent, to which no exception was taken. The proposed method of putting the Rules into the Italian Code is very like that later employed by the Germans; all the provisions of the Rules have been put into the new Code, but not in the order in which they occur in the Convention and the Rules. A concordance must therefore be constructed in order to locate each corresponding passage. The equivalent of £100 is declared to be 2,500 lire. The intention is to put the Code into effect, not merely for Italy, but for all Italian possessions.

No text book or legal article concerning the Italian ratification has yet been noted.

Before ratifying, Italy addressed a question to the American Government as to the scope and meaning of the American reservations; the reply of the State Department is printed at page 226, post.

Sweden. First of the Scandinavian states, Sweden enacted the Rules in literal translation, as agreed to at Brussels; and withheld the effective date until there should be corresponding legislation in Norway, Denmark and Finland; such legislation was completed in 1938. In Sweden, the sum corresponding to £100 is fixed at 1800 gold kroner. The Swedish law applies *proprio vigore* only to outward bills of lading; it also applies to all inward bills of lading issued abroad in the territories of states which have ratified the Convention. It thus applies to bills of lading issued in the U. S., but not in Canada.

Sweden, Norway, Denmark and Finland have a uniform Navigation Law, of which the Bill of Lading Law is a part.

For an account of the Swedish law, see Hugo Wikander: *1936 Års Sjölagsänderingar,* (Stockholm, 1937).

Denmark followed Sweden with a corresponding Act of May 7, 1937; it applies to all outward bills of lading issued in Denmark and to all inward bills of lading issued in countries (such as the U. S. A.) which have ratified the Convention. The sum corresponding the £100 is fixed at 1,800 kroner (paper) or 900 kroner (gold).

Norway followed Sweden and Denmark with the Act of February 4, 1938, with the same terms. The sum corresponding to £100 is fixed at 1,800 kroner.

Finland thereupon enacted the same statute on ———— —, 1939; the sum corresponding to £100 is fixed at 18,000 marks (in gold) or 1,800 Swedish Kroner.

Sweden, Norway and Denmark deposited their ratifications together on July 1, 1938; Finland did so on July 1, 1939. All four States made identical reservations of their coasting trade, their Baltic trades, and their railway services which are under the Rome Railway Conventions of 1933. No other State took exception to these reservations.

Germany. The German Commercial Code (Handelsgesetzbuch) was extensively amended on August 10, 1937, to bring the German Code into substantial correspondence with the Convention and the

Rules. The date of putting these amendments into effect was fixed by the Reichsminister of Justice as January 1, 1940. Every substantial provision of the Rules is found in the new text; but as the order and arrangement has been altered for the purpose of slipping the new material into the old Code with as little renumbering as possible, a concordance has to be constructed in order to locate each corresponding passage.

The equivalent of £100 is fixed at 1,250 gold marks. The list of exceptions (a) to (p) is restated and shrunk to errors of navigation and management, fire, and seven other exceptions, which, however, comprise the same matters. The Germans, like the French and the Italians, assimilate the Act of God and latent defect to the perils of the sea. The result is substantial uniformity of law in fact, but considerable difference in the form of the statute.

Germany deposited her ratification of the Convention on July 1, 1939, effective January 1, 1940.

The German amendments are not limited to the mere insertion of the provisions of the Convention; they include much other matter similar in effect to the Pomerene Act of 1916 relative to the effect of a negotiable bill of lading issued in sets, etc.

For an account of the German law, see Hans Gramm: *Das neue Deutsche Seefrachtrecht nach der Haager Regeln,* (Berlin, 1938).

Japan. While individuals and commercial organizations in Japan have urged ratification of the Convention at various times, and expressed the belief that Japan would do so, no action has yet (1941) been taken.

Spain ratified the Convention in 1930. No corresponding domestic statute appears to have been enacted, and no case or literature has been noted as to the application of the Rules in Spanish commerce. The Spanish Civil Code of 1889 and the Spanish Code of Commerce of 1886 contain provisions as to the responsibility of carriers, as to charter parties and bills of lading, which appear to remain effective despite the Spanish ratification of the Convention. The Spanish Codes are conveniently available in Fisher's Civil Code of Spain, with Philippine Notes & References (4th ed., 1930), and Espiritu's Code of Commerce of Spain, with Amendatory Laws of the Philippine Islands (4th ed., 1930).

TABLE OF UNIFORM "HAGUE RULES" LEGISLATION IN ALL COUNTRIES.

	Designation of Law	*Effective Date*
Australia	Act No. 22 of 1924	January 1, 1925
Belgium	Act of November 28, 1928 Code of Commerce, Livre II	January 22, 1929
Canada	Act of June 23, 1936	August 1, 1936
Denmark	Act of May 7, 1937	January 1, 1939
Finland	Act of ——, 1939	January 1, 1940
France	Act of April 2, 1936	October 4, 1937
Germany	Commercial Code, Amendments of August 10, 1937	January 1, 1940
Great Britain	Act of August 1, 1924 14 & 15 Geo. 5, c. 22	January 1, 1925
British Colonies, Territories and Mandates	See list, page 76	See list, page 76
India	Act No. 26 of Sept. 21, 1925	January 1, 1926
Italy	Maritime Code, draft revision of 1931, articles 292-311	Not yet proclaimed
Netherlands	Maritime Code, revision of February 1, 1927 (optional)	January 1, 1928
Newfoundland	Act of April 30, 1932	June 30, 1932
Norway	Act of February 4, 1938	January 1, 1939
Queensland	Act of Oct. 23, 1930, Session Laws, vol. XV, p. 13107.	1931
Sweden	Law No. 277 of June 5, 1936	January 1, 1939
United States of America	Act of April 16, 1936 49 Stat. 1207; 46 U. S. C. 1300	July 15, 1936

CARRIAGE OF GOODS BY SEA—BRITISH COLONIAL RATIFICATIONS AND ENACTMENTS.

	Ordinance, Order in Council or King's Regulation	Effective Date	Ratification of Convention	Effective Date
Antigua (Leeward Islands)	Nos. 2 and 10 of 10 March, 1926	1 Jan. 1927 Procl. 14 of 1926	2 Dec. 1930	2 June 1931
Ascension, see St. Helena				
Bahamas	16 G. 5, c. 3 Rev. Stat. 1929, ch. 161	21 Jan. 1926	2 Dec. 1930	2 June 1931
Barbados	Nos. 10 and 24 of 15 March 1926; amended for correction of s. 6 by No. 45 of 11 Nov. 1927	15 March, 1926	2 Dec. 1930	2 June 1931
Bermudas	No. 1 of 1926 extended by No. 54 of 1927 extended indefinitely by No. 71 of 1930	13 Jan. 1926	2 Dec. 1930	2 June 1931
British Guiana	No. 8 of 21 May, 1927; Rev. Stat. 1930, ch. 123.	as proclaimed in the Gazette	2 Dec. 1930	2 June 1931
British Honduras	No. 19 of 1926	1 Jan. 1927 Order 541 of 13 Oct. 1926	2 Dec. 1930	2 June 1931
British Solomon Islands (Western Pacific Islands)	No. 1 of 31 Mar. 1926	31 March 1926	2 Dec. 1930	2 June 1931
Caicos Island, see Jamaica				
Cameroons under British Mandate (see Nigeria)	No. 1 of 1 Jan. 1926	15 March 1926	2 Dec. 1930	2 June 1931
Cayman Islands, see Jamaica				
Ceylon	No. 18 of 1926	proclamation in the Gazette	2 Dec. 1930	2 June 1931
Channel Islands (Jersey, Guernsey, Sark)	Act of Sept. 4, 1926	1 Jan. 1927		
Cyprus	Nos. 8 of Feb. 2, 1927	4 Feb. 1927	2 Dec. 1930	2 June 1931
Dominica (Leeward Ids.)	No. 7 of 1826, No. 9 of 1927	1 Jan. 1927	2 Dec. 1930	2 June 1931
Ellice Islands, see Gilbert Ids.				
Falkland Islands and Dependencies	No. 7 of 21 March, 1927	31 Dec. 1927	2 Dec. 1930	2 June 1931
Fiji	No. 1 of 10 June, 1926 No. 5 of 28 Feb. 1928	as proclaimed in the Gazette	2 Dec. 1930	2 June 1931
Gambia	No. 5 of 28 May, 1926	1 Sept. 1926	2 Dec. 1930	2 June 1931
Gibraltar	No. 1 of 26 March, 1926	forthwith	2 Dec. 1930	2 June 1931
Gilbert & Ellice Islands Colony (Western Pacific Islands)	No. 1 of 31 March, 1926	31 March, 1926	2 Dec. 1930	2 June 1931
Gold Coast Colony	No. 2 of 12 March, 1926	1 May, 1926	2 Dec. 1930	2 June 1931
Grenada (Windward Ids.)	No. 4 of 25 March, 1926	1 April, 1926 Gazette 1 May, 1926	2 Dec. 1930	2 June 1931
Guernsey, see Channel Islands				
Hong Kong	No. 17 of 28 Dec. 1928	31 Dec. 1928	2 Dec. 1930	2 June 1931
Jamaica (incl. Cayman Islands, Turks and Caicos Islands)	No. 10 of 31 March, 1927	31 March, 1927.	2 Dec. 1930	2 June 1931
Jersey, see Channel Islands				
Johore, see Unfederated Malay States	No. 3 of 1928		2 Dec. 1930	2 June 1931
Kenya Colony and Protectorate	No. 16 of 1926	1 Jan. 1927 Notice No. 400	2 Dec. 1930	2 June 1931
Leeward Islands, see Antigua, Dominica, Montserrat, St. Christopher and Nevis, Virgin Ids. (British)				
Malay States, Federated, Negri Sembilan, Pahang, Perak and Selangor	No. 11 of 2 Aug. 1927 Laws of Federated Malay States, 1935, ch. 54	15 August, 1927	2 Dec. 1930	2 June 1931

CARRIAGE OF GOODS BY SEA—BRITISH COLONIAL RATIFICATIONS AND ENACTMENTS.

	Ordinance, Order in Council or King's Regulation	Effective Date	Ratification of Convention	Effective Date
Malay States, Unfederated, Johore	No. 3 of 1928		2 Dec. 1930	2 June 1931
Mauritius	No. 28 of 5 Nov. 1927	15 Feb. 1929 procl. No. 2 of 1929	2 Dec. 1930	2 June 1931
Montserrat (Leeward Islands)	No. 6 of 1926; No. 1 of 1927	1 Jan. 1927	2 Dec. 1930	2 June 1931
Nauru (under Australian Mandate)	No. 1 of 1925 (the Australian Act)	1 Jan. 1925	not ratified	
Negri Sembilian, see Malay States, Federated				
Nigeria, Colony and Cameroons	No. 1 of 15 March, 1926	15 March, 1926	2 Dec. 1930	2 June 1931
North Borneo	No. 5 of 1 Sept. 1927	1 Jan. 1928 Procl. No. 329	2 Dec. 1930	2 June 1931
Pahang, see Malay States, Federated				
Palestine	No. 43 of 1 Dec. 1926 Laws, 1926-1931, vol. I, p. 246	16 Feb. 1927 Off. Gaz. No. 181	2 Dec. 1930	2 June 1931
Perak, see Malay States, Federated				
St. Christopher and Nevis (Leeward Islands)	No. 1 of 1926 No. 4 of 1927	1 Jan. 1927	2 Dec. 1930	2 June 1931
St. Helena and Ascension	no legislative action taken		3 Nov. 1931	3 May 1932
St. Lucia (Windward Islands)	No. 12 of 1926	1 April, 1926	2 Dec. 1930	2 June 1931

St. Vincent (Windward Islands)	No. 13 of 1926	1 April, 1926	2 Dec. 1930	2 June 1931
Sarawak	No. C-4 of 8 June, 1931 Law, 1927-1935, p. 121	1 August, 1931	3 Nov. 1931	3 May 1932
Sark, see Channel Islands				
Selangor, see Malay States, Federated				
Seychelles	No. 7 of 22 Sept. 1926		2 Dec. 1930	2 June 1931
Sierra Leone	No. 13 of 8 April, 1926	10 April, 1926	2 Dec. 1930	2 June 1931
Singapore, see Straits Settlements				
Somaliland Protectorate	No. 6 of 17 Dec. 1926 (adopting the Indian Act of 1925, deleting sec. 5 (b) relating to trade between India and Ceylon, and exempting dhows of less than 500 tons burden)	17 Dec., 1926	2 Dec. 1930	2 June 1931
Straits Settlements	No. 4 of 20 April, 1927	1 October, 1927 Procl. 1927, p. 36	2 Dec. 1930	2 June 1931
Tanganyika Territory	No. 6 of April 27, 1927 Rev. Stat. 1928, ch. 117	1 Jan. 1928 Notice 120 of 1927	2 Dec. 1930	2 June 1931
Tonga	No. 13 of 12 Aug. 1927 Laws (1928) ch. 67 Note: Sch. II is a prescribed bill of lading)	1 Sept. 1927	2 Dec. 1930	2 June 1931
Trinidad and Tobago	No. 6 of 22 April, 1926	1 Jan. 1927 Procl. No. 32, of 6 July, 1926	2 Dec. 1930	2 June 1931

CARRIAGE OF GOODS BY SEA—BRITISH COLONIAL RATIFICATIONS AND ENACTMENTS (Continued).

	Ordinance, Order in Council or King's Regulation	Effective Date	Ratification of Convention	Effective Date
Virgin Islands (British) (Leeward Islands)	No. 7 of 1925 No. 1 of 1927	1 Jan. 1927	2 Dec. 1930	2 June 1931
Western Pacific Islands, British Solomon Ids., Ellice Islands, Gilbert Islands, Tonga	No. 1 of 31 March, 1926	31 March, 1926	2 Dec. 1930	2 June 1931
Windward Islands, Grenada, St. Lucia, St. Vincent	No. 4 of 25 March, 1926	1 April, 1926 Gazetted 1 May, 1926	2 Dec. 1930	2 June 1931
Zanzibar Protectorate	No. 3 of 15 Jan. 1926 three errors in text corrected by No. 3 of 1927	31 March, 1926	2 Dec. 1930	2 June 1931

Note: No British legislative action or ratification seems to have taken place in respect of Ashanti, Basutoland, Bechuanaland, Iraq, Malta, New Guinea, New Hebrides, Nyassaland, Rhodesia, (Northern and Southern), Samoa, Southwest Africa, Sudan, Swaziland, Togoland, Trans-Jordania, Uganda, Wei-hai-wei.

UNIFORM NORTH ATLANTIC BILL OF LADING CLAUSES, 1937.

Bill of Lading recommended to the Steamship Lines participating in the Associated North Atlantic Freight Conferences, New York, on March 10, 1937, by Roscoe H. Hupper, *Chairman,* Cletus Keating, Charles S. Haight, George de Forest Lord, *Committee,* and subsequently approved by the Conference and put into general use on September 1, 1937.

A B C STEAMSHIP COMPANY
(TIMBUKTU SERVICE)

BILL OF LADING

Receipt—Scope of Contract.

RECEIVED by ....., hereinafter called the Carrier, from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned in apparent good order and condition unless otherwise indicated in this bill of lading, to be transported subject to all the terms of this bill of lading with liberty to proceed via any port or ports within the scope of the voyage described herein, to the port of discharge or so near thereunto as the ship can always safely get and leave, always afloat at all stages and conditions of water and weather, and there to be delivered or transshipped on payment of the charges thereon.

Forwarding Shut Out Goods.

If the goods in whole or in part are shut out from the ship named herein for any cause, the carrier shall have liberty to forward them under the terms of this bill of lading on the next available ship of this line, or, at carrier's option, of any other line.

Agreement.

It is agreed that the custody and carriage of the goods are subject to the following terms which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, master and ship in every contingency, wheresoever and whensoever occurring, and also in the event of deviation, or of unseaworthiness of the ship at the

time of loading or inception of the voyage or subsequently, and none of the terms of this bill of lading shall be deemed to have been waived by the carrier unless by express waiver in writing signed by a duly authorized agent of the Carrier:

Clause Paramount.

1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act.

"Before and After" Clause.

The provisions stated in said Act shall (except as may be otherwise specifically provided herein) govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier.

Denial of Liability When Not Actually Custodian.

The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or misdelivery, or loss or damage to the goods occurring while the goods are not in the actual custody of the Carrier.

Terms Defined.

2. In this bill of lading, the word "ship" shall include any substituted vessel, and any craft, lighter or other means of conveyance owned, chartered or operated by the carrier; the word "carrier" shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether the owner, operator, charterer or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; the word "consignee" shall include the holder of the bill of lading, properly endorsed, and the receiver and the owner of the goods; the word "charges" shall include freight and all expenses and money obligations incurred and payable by the goods, shipper, consignee, or any of them.

Voyage.

3. The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract

or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route. The ship may call at any port for the purposes of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may, either with or without the goods on board, and before or after proceeding toward the port of discharge, adjust compasses, dry dock, go on ways or to repair yards, shift berths, take fuel or stores, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage.

Risk of Capture, Damage, Delay, etc.

4. In any situation whatsoever or wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is likely to give rise to capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port the Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may, without giving any prior notice, discharge the goods into depot, lazaretto, craft, or other place and the goods shall be liable for any extra expense thereby incurred; or the master may proceed or return, directly or indirectly, to or stop at such other port or place whatsoever as he or the carrier may consider safe or advisable under the circumstances, and discharge the goods or any part thereof there without giving any prior notice, and when landed as hereinabove provided, the goods shall be at their own risk and expense, the delivery thereof by the carrier shall be considered complete and the carrier shall be freed from any further responsibility in respect thereof except to mail notice of the disposition of the goods directed to the shipper or consignee named in this bill of lading at such address as may be stated herein; or the master may retain the cargo on board until the return trip or until such time as he or the carrier thinks advisable; or the master may forward the goods by any means by water

or by land, or by both such means, at the risk and expense of the goods. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to a reasonable extra compensation.

Compliance with Government Orders—Carriage of Contraband.

5. The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

Description of Goods.

6. Unless otherwise stated herein, the description of the goods and the particulars of the packages mentioned herein are those furnished in writing by the shipper and the carrier shall not be concluded as to the correctness of leading marks, number, quantity, weight, guage, measurement, contents, nature, quality or value.

Heavy Lifts.

Single pieces or packages exceeding 4480 lbs. in weight shall be liable to pay extra charges in accordance with tariff rates in effect at time of shipment for loading, handling, transshipping or discharging and the weight of each such piece or package shall be declared in writing by the shipper on shipment and clearly and durably marked on the outside of the piece or package. The shipper and the goods shall also be liable for, and shall indemnify the carrier in respect of any injury, loss or damage arising from shipper's failure to declare and mark the weight of any such piece or package or from the incorrect weight of any such piece or package having been declared or marked thereon.

Underdeck Spaces.

7. Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger space, or any other covered-in space commonly used in the trade for the carriage of goods, and when so stowed shall be deemed for all purposes to be stowed under deck.

Deck Cargo.

In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils inherent in such carriage shall be borne by the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1. (C) thereof.

Special Heating or Cooling.

Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate.

Live Animals.

8. Live animals, birds and fish are received and carried at shipper's risk of accident or mortality, and the Carrier shall not be liable for any loss or damage thereto arising or resulting from any matters mentioned in Section 4, Sub-section 2, (a) to (p) inclusive of said Carriage of Goods by Sea Act or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived by the shipper. Except as provided above such shipments shall be deemed goods, and shall be subject to all terms and provisions in this bill of lading relating to goods.

Both-to-blame Collisions.

9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

10. General Average. [*This clause is not standardized. Each carrier may insert the average clause used by the particular carrier, with reference to York-Antwerp Rules 1924, and with such variations as are customary due to nationality of the several carriers. The "American form" of York-Antwerp Rules clause recommended by the American committee is printed herewith in Appendix B.*

The Through Export B/L should only provide with respect to G/A that it is governed by the ocean B/L, as G/A is generally of interest only to the consignee or underwriters (very rarely to the shipper) and the carrier.]

Jason (revised) Clause—Cargo's G. A. Contribution to Loss Due to Negligence for which Carrier is Not Liable—Salvages—G. A. Deposits.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

Trans-shipment and Forwarding.

11. Whenever the carrier or master may deem it advisible or in any case where the goods are consigned to a point where the ship does not expect to discharge, the carrier or master may, without notice, forward the whole or any part of the goods before or after loading at the original port of shipment, or any other place or places even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any vessel, vessels or other means of transportation by water or by land or by both such means, whether operated by the carrier or by others and whether departing or arriving or scheduled to depart or arrive before or after the ship expected to be used for the transportation of the goods. This carrier, in making arrangements for any transshipping or forwarding vessel or means of transportation not operated by this carrier shall be considered solely the forwarding agent of the shipper and without any other responsibility whatsoever.

The carriage by any transshipping or forwarding carrier and all transshipment or forwarding shall be subject to all the terms whatsoever in the regular form of bill of lading, freight note, contract or other shipping document used at the time by such carrier, whether issued for the goods or not, and even though such terms may be less favorable to the shipper or consignee than the terms of this bill of lading and may contain more stringent requirements as to notice of claim or commencement of suit and may exempt the on-carrier from liability for negligence. The shipper expressly authorizes the carrier to arrange with any such transshipping or forwarding carrier that the lowest valuation of the goods or limitation of liability contained in the bill of lading or shipping document of such carrier shall apply even though lower than the valuation or limitation herein. Pending or during transshipment the goods may be stored ashore or afloat at their risk and expense and the carrier shall not be liable for detention.

General Port Clause.

12. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the carrier may determine no matter what the state of the weather or custom of the port may be. The carrier shall not be liable in any respect whatsoever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharge or any part of the time that the goods are upon the wharf, craft, or other loading or discharging place. All lighterage and use of craft in discharging shall be at the risk and expense of the goods. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein provided for. If the goods are not taken away by the consignee by the expiration of the next working day after the goods are at his disposal, the goods may, at carrier's option and subject to carrier's lien, be sent to store or warehouse, or be permitted to lie where landed, but always at the expense and risk of the goods. The responsibility of the carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The carrier shall not be required to give any notification of disposition of the goods.

[NOTE: Special port clauses may be added as provided in the "Before and After" Clause, 1, *supra.*]

Delivery by Marks—Sweepings, etc.

13. The carrier shall not be liable for failure to deliver in accordance with leading marks unless such marks shall have been clearly and durably stamped or marked by the shipper before shipment upon the goods or packages, in letters and numbers not less than two inches high, together with name of the port of discharge. Goods that cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for shall be allocated for completing delivery to the various consignees of goods of like character in proportion to any apparent shortage, loss of weight or damage.

When grain is stowed without separation from other grain shipped either by the same shipper or by other shippers, any loss or damage to the combined shipments shall be divided in proportion among the several shipments.

Mending, Coopering, Reconditioning, etc.—Fines, Dues, Seizures, etc.

14. The goods shall be liable for all expense of mending, cooperage, baling or reconditioning of the goods or packages and gathering of loose cargo or contents of packages; also for any payment, expense, fine, dues, duty, tax, impost, loss, damage or detention sustained or incurred by or levied upon the carrier or the ship in connection with the goods, howsoever caused, including any action or requirement of any government or governmental authority or person purporting to act under the authority thereof, seizure under legal process or attempted seizure, incorrect or insufficient marking, numbering or addressing of packages or description of the contents, failure of the shipper to procure consular, Board of Health or other certificates to accompany the goods or to comply with laws or regulations of any kind imposed with respect to the goods by the authorities at any port or place or any act or omission of the shipper or consignee.

Freight—Calculation—Lien—Liability of Consignor and Consignee.

15. Freight shall be payable on actual gross intake weight or measurement or, at carrier's option, on actual gross discharged weight or measurement. Freight may be calculated on the basis of the particulars of the goods furnished by the shipper herein but the carrier may at any time open the packages and examine, weigh, measure and value the goods. In case shipper's particulars are found to be erroneous and additional freight is payable, the goods shall be liable for any expense incurred for examining, weighing, measuring and valuing the goods. Full freight shall be paid on damaged or unsound goods. Full freight hereunder to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ship and/or cargo lost or not lost. If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere any forwarding of the goods or any part thereof shall be at the risk and expense of the goods. All unpaid charges shall be paid in full and without any offset, counterclaim or deduction in the currency of the country of the port of shipment, or, at carrier's option, in the currency of the port of discharge at the demand rate of New York exchange as quoted on the day of the ship's entry at the Custom House of her port of discharge. The carrier shall have a lien on the goods, which shall survive delivery, for all charges due hereunder and may enforce this lien by public or private sale and without notice. The shipper and consignee shall be jointly and severally liable to the carrier for the payment of all charges and for the performance of the obligation of each of them hereunder.

Fire.

16. Neither the carrier nor any corporation owned by, subsidiary to or associated or affiliated with the carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless such fire shall be caused by its design or neglect.

Value—Liability Pro Rata—Declaration of Excess Value.

17. In case of any loss or damage to or in connection with goods exceeding in actual value $500. lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500. per package or per unit, on which basis the freight is adjusted and the carrier's liability, if any, shall be determined on the basis of

a value of $500. per package or per customary freight unit, or *pro rata* in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500. shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted *pro rata* on the basis of such declared value.

Notice of Loss or Damage.

18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery.

Time for Suit.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered.

Previous Agreements Superseded.

19. All agreements or freight engagements for the shipment of the goods are superseded by this bill of lading, and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding.

Statutory Limitation of Liability.

Nothing in this bill of lading shall operate to limit or deprive the carrier of any statutory protection or exemption from, or limitation of, liability.

Surrender of B/L Upon Delivery of the Goods.

If required by the carrier, one signed bill of lading duly endorsed must be surrendered to the agent of the ship at the port of discharge in exchange for delivery order.

IN WITNESS WHEREOF, the master or agent of the said vessel has signed ..... Bills of Lading, all of this tenor and date, and if one is accomplished, the others shall be void.

Dated, this.....day of .....193....

A B C STEAMSHIP COMPANY

By .....

FOR THE MASTER

Explosives—Dangerous Articles—U. S. Act of March 4, 1909.

Attention of shippers is called to the provisions of 18 U. S. C. A. Sec. 385 (Criminal Code Sec. 235 as amended), imposing upon shippers a penalty of $2,000 or imprisonment for 18 months, or both, for delivering to a carrier packages containing explosives or other dangerous articles without having the contents plainly marked on the outside thereof, or without informing the agent of the carrier in writing of the true character thereof; and also, to the provisions of 46 U. S. C. A. Sec. 175, which provides that any person shipping oil of vitriol, inflammable matches or gun powder in a vessel which is a common carrier, without delivering a note in writing expressing the nature and character of the merchandise to the person in charge of loading the vessel, shall be liable to the United States in the penalty of $1,000.

False Billing.

Attention of shippers, consignors, consignees, forwarders, brokers and other persons is called to the provisions of Sec. 16 of the Shipping Act, 1916, as amended by the Act approved June 16, 1936, in relation to penalty of not more than $5,000 in relation to false billing, false classification, false weighing, false report of weight, or any other unjust or unfair device or means to obtain or attempt to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable.*

SHIP: { M.S. / S.S. } PORT OF LOADING: .....

SHIPPER: .....

CONSIGNEE: ORDER OF.....

ARRIVAL NOTICE TO

BE ADDRESSED TO: .....

* For text, see Appendix G.

PORT OF DISCHARGE FROM SHIP: .....

DESTINATION OF GOODS (If goods to be transshipped at port of discharge): .....

SCOPE OF THE VOYAGE: The carrier's general trade is between (state general range of ports at one end of voyage) and (state general range of ports at the other end of voyage) via (state any intermediate localities served) and includes the following ports: (State all ports served in the trade.)

PARTICULARS FURNISHED BY SHIPPER OF GOODS.

Leading Marks	Quantity or Number of Pieces or Packages	Description of Goods	Gross Weight		Measurement
			Pounds	Kilos	

(FREIGHT PARTICULARS TO BE INSERTED).

NOTE: The foregoing standardized uniform clauses are to be used in all cases *without change or alteration,* as bankers, consignees, and insurance underwriters will rely on "Uniform North Atlantic Bills of Lading" as adhering strictly to the foregoing agreed text.

Bills of lading which vary the text *must not be marked* "Uniform North Atlantic Bills of Lading"; and should be plainly marked to show that their clauses are *not* the "uniform" clauses.

Cotton bills of lading may be marked "issued under agreement with the Liverpool Cotton B/L Conference (1907)" if the issuing carrier or agency adheres to the Cotton Agreement printed at page 93. See also page 96.

COTTON BILL OF LADING AGREEMENT.

PORT AGENT'S FORM.

To the Chairman of the

BILL OF LADING CONFERENCE COMMITTEE,
LIVERPOOL.

Dear Sir,

We hereby agree with the Liverpool Bill of Lading Conference Committee to issue our Bills of Lading for the transportation of Cotton from the United States to Europe on the following terms:—

1. No Bill of Lading is to be signed unless the Cotton itself is actually delivered to the Captain or to us/me as authorised Agent in the port of shipment.

2. All Bills of Lading will be signed either by ourselves or by the Captain, or by us/me as authorised Agent. In the latter case our/my signature to be prefaced by the words "By authority of the Owners" which will clearly establish their responsibility.

   (a) A Port Bill of Lading is to be marked as a "Port Bill of Lading issued under agreement with the Liverpool Bill of Lading Conference Committee," and is on no account to be issued unless the Vessel for which it is signed is in Port.

   Except in cases of force majeure, strikes or other unavoidable and unforeseen events, all Cotton for which a Port Bill of Lading is issued will be actually put on Board within ten days from date of such Bill of Lading. If the Cotton or a portion of it is unavoidably shut out from the Vessel for which the Port Bill of Lading has been issued in good faith, such shut out Cotton will be shipped by next following vessel, but on no account later than twenty days after sailing of the Steamer for which the Bill of Lading is issued.

   (b) a Custody Bill of Lading is to be marked as a "Custody Bill of Lading issued under agreement with the Liverpool Bill of Lading Conference Committee" and may be issued before arrival of the vessel in port, and it is to contain the Clause:—

"Substitution of another Vessel of different Ownership is only "permissible in case the named Vessel is lost, or in case of "accident, or other unforeseen event of force majeure."

We undertake to furnish a Master's Receipt within three weeks from date of such Bill of Lading, proving that the Cotton had been actually shipped within that time. Such Master's Receipt is, however, not intended to take the place of the original Bill of Lading, nor shall it in any way modify the rights of the holder of such Bill of Lading against ourselves or in respect of the property.

3. All Bills of Lading will be numbered consecutively, starting on the 1st January of each year, from each shipping port with No. 1 and adding the year. Port Bills of Lading and Custody Bills of Lading to be numbered separately, thus:—

New York Port Bill of Lading	No. 1—1911
New York Custody Bill of Lading	No. 1—1911
Savannah Port Bill of Lading	No. 1—1911
Savannah Custody Bill of Lading	No. 1—1911.

4. Except in cases of force majeure, strikes or other unavoidable and unforeseen events, all Cotton shipped on Through Bills of Lading will be actually put on board the carrying Vessel within twenty one days from the date of its arrival at the Port of Shipment. In all cases where the receipt for the Cotton is signed by the authorised Agent instead of the Captain the signature will be prefaced by the words "By authority of the Owners." If called upon by the Liverpool Bill of Lading Conference Committee the Agent must produce proof of such authority.

The Owners who have authorised us/me to sign on their behalf are as under:—

Yours truly,

Date.....

LIVERPOOL AND MANCHESTER RECEIVED FOR SHIPMENT BILL OF LADING CLAUSE.

This Bill of Lading is issued subject to the undermentioned undertakings by the Carrier:—

1. No Received for Shipment Bill of Lading will be issued:—

(A) until the goods are in the possession of the Carrier, or some party duly authorised on his behalf;

(B) except for a named ship in which space has been actually reserved;

(C) prior to seven days before the ship is expected to be in port in readiness to load.

2. In the event of the goods being unavoidably shut out from the named ship, the Carrier shall forward them, by his next available ship, or at his option by a ship of some other Line, upon the terms of this Bill of Lading.

NOTE: A similar Cotton Agreement is adapted for the use of Railroads at inland points of shipment which receive and ship cotton on through export railroad bills of lading. This agreement was signed in 1911 by the following Railroads:

Atlantic Coast Line	Kansas City Southern
Atlanta and West Point	Missouri Kansas and Texas
Atchison Topeka and Santa Fe	Missouri Pacific
Chicago Rock Island and Pacific	Panhandle and Santa Fe
Colorado and Southern	Seaboard Air Line
Georgia and Florida	Southern Pacific
Gulf Mobile and Northern	Southern Railway
Illinois Central	St. Louis and San Francisco

The text of the Railroad Agreement was reproduced in the first printing of this book; it is now obsolete because of the superseding operation of Section 22 of the Pomerene Act.

HISTORICAL STATEMENT
AND
COMMENTARY

"No self-imposed constitutional limitation rests upon the United States in the interest of world unity of the maritime law."

—Gustavus H. Robinson,
XXI Cornell L. R. 54.

THE AMERICAN PARTICIPATION IN THE MOVEMENT FOR UNIFORMITY IN OCEAN BILLS OF LADING.

The American contribution to the development which culminated in the Hague Rules was of vital importance at two points. First, in 1893, after more than a decade of groping for the formula which would express in a satisfactory manner the desired distinction between faults which a shipowner should be forbidden to avoid by contract, and faults (consisting of errors of judgment and carelessness during the voyage), as to which he should be allowed exoneration, the successful phrase was discovered during the "long hearings" before the Senate Committee on Commerce in Washington in January, 1893, and embodied in the Harter Act. Again, in 1922, when it was desired to utilize the Harter Act as the basis of the expanded agreement under discussion at The Hague, a great American Admiralty Judge and a most experienced American Admiralty lawyer were consulted and one of them presided over the sub-committee which revised the final drive to bring about diplomatic and legislative action was the initial texts were hammered out at sessions of the International Law Association in its early days, when its inspiration was still strongly American; various events in the United States kept the matter alive in the long interim between 1893 and 1921; and the final drive to bring about diplomatic and legislative action has been conducted, through the International Chamber of Commerce, by an American as Chairman of its Bills of Lading Committee. Many minds in many countries have contributed to the successful result; but no country has contributed more, and at more points along the way, than the United States.

The history of the matter appears to begin with the early discussions of the International Law Association, founded in 1873 and known, until 1895, as the Association for the Reform and Codification of the Law of Nations. That Association, as has often been said with well-justified pride, was largely brought into being by two Americans—David Dudley Field of New York and Rev. James B. Miles of Boston. The rapid development of ocean steamers, built of iron and steel, with Scotch boilers, reciprocating engines and screw propellers, in the decades following the Civil War, resulted in a great

expansion of safe and rapid ocean trade, accompanied by an elaboration of shipping documents, banker's drafts, bills of lading, insurance policies, and devices for the assertion of subrogated tort and contract claims for losses and damages and for avoiding or defending such claims. The views of the English, Continental and American judges as to the nature of the carrier's obligations and the propriety of contracts exonerating carriers from their common-law liabilities soon came into head-on collision. In the English courts, contracts of exoneration were valid. In the American federal courts, they were invalid; some of the American state courts followed the federal courts; a few—notably those of New York—followed the British courts. A chaotic legal situation developed with great suddenness.

The International Law Association was quick to appreciate the need of reform and codification, and attacked the subject at its early meetings. After debates, a "model bill of lading"—which became known as the "Conference form," was adopted at Liverpool in 1882, in which the idea of "due diligence" was expressed; the general form of the negligence clause consisted of a list of specific causes and kinds of loss which shipowners and carriers were not required to pay. It is interesting to notice that the value per package was then put at £100—a figure which the carriers rejected for forty years but finally accepted in 1921. This "Conference form" was promptly studied by the New York Produce Exchange and promulgated by it in 1883 with some amendments; a further revision was adopted on October 28, 1884. The model bill of lading was recast in Hamburg in 1885, and became known as the "Hamburg Rules." The matter was again debated at London in 1887. Mr. Everett P. Wheeler, of New York led a movement to further revise the Produce Exchange form in 1889.

In 1890, the Glasgow Corn Trade Association brought the discontent of the cargo-owning and shipper interests into sharp focus by adopting a series of resolutions. They complained that the exonerating clauses—which had become known as "negligence clauses" because of the phraseology employed to off-set the rising tide of American court decisions adverse to shipowners—had surpassed all bounds of reason and fairness. The outburst of indignation seems to have been summoned forth by the appearance of bills of lading which not only excused the carrier from every negligence, but also imposed a lien on the cargo for any indebtedness of the cargo owner, whether connected with the particular shipment or wholly unrelated thereto, and claimed exclusive British jurisdiction and the application of British law in all trades and in all places.

It was said that the negotiability of the bill of lading, on which England's predominant position in the ocean carrying trade rested, was gravely imperilled. The text of these resolutions was read into the Congressional Record in 1892, and was extensively quoted by Mr. Justice Henry Billings Brown in writing the Supreme Court's opinion in the *Delaware Case* in 1896.

In England, the shipowners were powerful in Parliament, and the complaints of the owners of cargo failed to move either the judges or the lawmakers until 1920. But in the United States, shipowning was at its lowest ebb; the export trade from America was in the hands of some twenty British liner companies, who by reason of the fact that they owned the most suitable ships enjoyed such a virtual monopoly that Mr. Harter stated on the floor of the House that the bill, as restricted to foreign commerce, would not influence or affect one one-hundredth of one percent of American ships. The cargo-shipping interests in the United States were exceedingly powerful. They were incensed, not merely by the clauses complained of in the Glasgow resolutions, but also by the general use of a clause specifying that all cargo litigation should be conducted in English courts and under English law. In the fall of 1892, a Bill, H. R. 9176, was introduced into the 52nd Congress, 2nd session, which became known by the name of Congressman Michael D. Harter, of Ohio. As a matter of record, however, the bill was chiefly pushed by Congressman John Lind, of Minnesota, who brought about its passage by the House on December 15, 1892. As it passed the House, the Bill consisted of seven sections: the first and second forbade clauses of exoneration; the third granted certain exemptions in the following terms:

"Section 3. That if any vessel transporting merchandise or property between ports in the United States of America and foreign ports shall, on starting her voyage, be in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or master shall become or be held responsible for damage or loss resulting from error of judgment in navigation or in the management of said vessel, if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery."

The fourth required masters to issue bills of lading showing marks and numbers; the fifth authorized Collectors of Customs to deny

clearance to any vessel whose bills of lading (or lack of them) violated the Act; the sixth saved the operation of the "fire" and "limitation" laws; and the last declared the Act effective as of September 1, 1892. This Bill was then sent to the Senate.

On January 6th, 1893, Mr. Harter pressed the matter by introducing a resolution calling on the Secretary of State for information concerning foreign shipping; in the meantime, according to later statements made in the House, lengthy debates were occurring in the Senate Committee on Commerce, to which the Bill had been referred, and witnesses were heard. On February 4, the Bill was reported to the Senate with many amendments; but the committee report was not printed, and the source of the various amendments was not revealed. It was stated that the clause excepting shipment of live animals from the operation of the Act was supplied by Senator George G. Vest, of Missouri. Senator William P. Frye of Maine who presented the amended Bill to the Senate, emphasized that the Bill had been broadened to apply to all bills of lading in domestic as well as in foreign trade, and that the amendments had made the bill unanimously acceptable to all interests, including shipowners and also underwriters. This had obviously been brought about by the now familiar formula of Section 3 that the shipowner, if he used "due diligence" to make his vessel seaworthy prior to commencing the voyage should be exonerated, by statute, from liability for "faults and errors in the navigation or management of the vessel," coupled with the indirect provision of Section 1 to the effect that shipowners must be liable for "negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of lawful merchandise committed to their charge.

The Senate passed the amended Bill on February 4th; and it was sent to the House in its amended form. The House took it up on February 7th; the Senate amendments were presented with cordial approval by Mr. Lind and Messrs. Buchanan of New Jersey, Coombs of New York, and Charles O'Neill of Pennsylvania; and the House concurred in them after a short debate. The President signed it on February 13, 1893, and it became law.

The constitutionality of the Harter Act has never been questioned on the many occasions when it has been before the Supreme Court. *Delaware* (1896), 161 U. S. 459, 470; *Irrawaddy* (1898), 171 U. S. 187, 193; 73 Fed. 342. It seems obvious that it must derive its constitutional authority from the admiralty clause, because it applies in domestic commerce to transactions which are not interstate but merely maritime. *Sacramento Nav. Co.* vs. *Salz*, 1927 A. M. C. 397, 273 U. S. 326.

The legend is that the fortunate formula was devised by Mr. Stephen Loines and presented by Mr. J. Parker Kirlin who with Mr. Harter persuaded the conferees from the two Houses of Congress to accept it. There is, however, no official record of the conference proceedings.

The Harter Act, which applied to both inward and outward bills of lading, turned out to be fair and practical in operation. The courts have declined to be dogmatic in defining "due diligence," judging each case on its merits as it arose, so that shipowners, being uncertain what will ultimately be held to be "due diligence," are strongly spurred to err on the side of diligence. After a decade of observation of the new statute, Australia (1904), and New Zealand (1908) and Canada (1910) presently copied it. The situation in England, where much of the damage litigation naturally centered because of the preponderant marine insurance and ship-owning interests, did not, however, develop in a manner equally satisfactory to the owners and underwriters of cargo, for the English courts, strong in the tradition of freedom of contract, construed the "Harter Act clauses" which came before them in American bills of lading, as merely one of the clauses of the voluntary bill of lading contract, to be construed with the other clauses of the contract which were frequently contradictory.

For thirty years after the Harter Act, standardization and uniformity made little progress. The London Conference of the International Law Association of 1893 proposed a "general bill of lading" which was also spoken of as the "rules of affreightment." This fell still-born, as was recognized when the matter was next discussed at Oslo in 1905. Commerce continued to move under a wide variety of bills of lading drawn by counsel for each line according to the views of each shipowner or charterer. Cargo owners, bankers and underwriters were annoyed but did nothing.

The P. & I. Clubs prescribed a few standard clauses—as for example the Jason clause after 1911—and penalized members who did not use such clauses when they sought reimbursement of claims paid in larger amounts than would have been payable if the prescribed clause had been used. Beyond this, uniformity was not promoted.

In 1900 an International Conference of Underwriters held in Paris

listened to complaints about the unfair workings of the negligence clause, considered as a threat the possibility of refusing any but the risks mentioned in Section 3 of the Harter Act, and passed a resolution favoring the Harter Act formula. When the International Law Association met at Christiania (Oslo) in 1905, a resolution to make efforts to control the negligence clause was barely defeated, there being a tie vote; consequently a full debate was had at Berlin in 1906. Dr. F. Sieveking of Hamburg and Mr. Justice WALTON of London presented papers freely admitting the useful characteristics of the Harter Act but expressing the opinion that it would not do in Europe, where complete freedom of contract was better; Justice WALTON referred to the satisfactory working of several standardized bill of lading forms voluntarily adopted in various trades—the General Produce Steamer form, 1885; the Grain Steamer form, 1885 (both used in Mediterranean, Black Sea and Baltic trades) and the New York Produce Exchange form, 1883-1885-1889. But Mr. H. Eckstein, a Hamburg underwriter, argued strongly for greater uniformity and for control of negligence clauses; the result was a vague resolution to observe the progress of events.

In 1896, the Comité International Maritime was formed for the purpose of conducting the work of the International Law Association in the maritime field in more intimate contract with shipowners, shippers, underwriters and bankers than was possible under the general form of organization of the Association. The Comité and the Association thereafter rather ignored the matter of bills of lading, and, until 1920, turned their attention to the unification of other chaotic fields of international private maritime law—collision, salvage, liens and mortgages, limitation of liability, and the immunity of vessels owned by sovereigns. In 1910 their first effort in these directions bore fruit in the Salvage Convention and the Collision Convention, which were widely adopted in 1911 and 1912. The Secretariat of the International Maritime Committee thereupon asked the national Maritime Law Associations to suggest subjects for further effort, and on October 18, 1912, the Maritime Law Association of the United States adopted the following resolution, on motion of Mr. Everett P. Wheeler:

"RESOLVED, that this Association respectfully recommends to the International Maritime Committee the consideration of the subject of international regulation of foreign bills of lading."

This appears to have started the matter up again. The circular of the International Maritime Committee of June 8, 1913, indicates that the question of bills of lading was still assimilated to the project of an international code of affreightment intended to deal with charter parties. The two matters were, however, soon separated.

The Great War, of course, halted everything, but the matter was revived with great energy in the British Empire soon after the restoration of peace.

The driving force at that time was the demand of cargo interests, expressed in 1920 at the World Shipping Conference, for British legislation to limit the freedom with which shipowners could insert exoneration or negligence clauses in ocean bills of lading. The result of this agitation was a general agreement that the principles of the American Harter Act of 1893 were fair. These principles were then already law in Canada, Australia, New Zealand and, apparently, Morocco. A bargain was struck in February, 1921, at a small meeting in London, to put the Harter Act principle into effect generally, and the aid of the International Law Association was secured.

In May, 1921, the U. S. Chamber of Commerce appointed a committee to draft an ocean bill of lading for the June meeting of the International Chamber of Commerce, and meetings were held in New York attended by cargo underwriters.

At the meeting of the Maritime Law Committee in London on May 17th to 20th, 1921, a small drafting Committee was formed consisting of representatives of cargo owners, bankers, underwriters, and of British and Continental shipping interests. The draft was ready about the middle of June, and in the following two months three thousand copies were circulated in Great Britain and the Dominions, on the Continent of Europe, and in the United States of America.

At a meeting of the International Chamber of Commerce, which was held in London on 27th June, 1921, the draft was well received. A Bill of Lading Committee was formed consisting of representatives of Great Britain, France, Italy, Holland, Belgium, Norway, Sweden and Denmark, under the Chairmanship of Mr. Charles S. Haight, of New York, and Mr. Haight personally travelled over the Continent to discuss the draft with the various shipping interests and later did the same in the United States.

No efforts were spared to bring the draft Rules to the notice of all interested parties, and to invite all of them to express their views thereon and to attend the Hague Conference in order to discuss the issues.

All the interests concerned were invited to study and criticise the draft, and to send their representatives to the Hague in September, 1921.

Through the various Legations, Consulates, High Commissioners and Agents-General, and the principal Chambers of Commerce copies were circulated among the shipping and cargo interests in the Argentine Republic, Belgium, Brazil, Denmark, Finland, France, Greece, Italy, Japan, Mexico, The Netherlands, Norway, Portugal, Spain, United States of America, Venezuela, and the Dominions of Australia, Canada, South Africa and Newfoundland.

In the meantime, the Comité Maritime International met at Antwerp on July 28-30, 1921, and received many reports on what were called "exonerating clauses in bills of lading." No American attended that meeting, the first since the war.

At the Hague Conference, in September, 1921, the Maritime Law Committee met in a separate session under the chairmanship of its President, the Right Honorable Sir Henry Duke. A preliminary meeting of the members of the Committee was held the day previous to the Conference in order to fix the procedure and the program of work, and a series of sittings which extended over four days was devoted to the discussion and amendment of the draft, while its ultimate form was unanimously agreed.

The resulting text became known as the Hague Rules, 1921; it was intended that these Rules would be voluntarily incorporated in bills of lading by reference, in the same manner as the well-known York-Antwerp Rules of general average which had been in satisfactory use since 1860.

The voluntary principle of the 1921 Hague Rules was promptly and vigorously assailed by groups of shippers, under the leadership of the Corn Trade (which voiced 41 objections to the Rules), and a veritable flood of public and private pamphlets inundated the shipping community. It was decided to meet these objections by re-casting the Rules in legislative form. At this point the advice of persons experienced in the workings of the Harter Act was desired, and it was arranged that Honorable Charles M. Hough, United States Circuit Judge, Second Circuit (New York), and at that time President of the Maritime Law Association of the United States, and Norman Beecher, Esq., of New York, at that time admiralty counsel of the Shipping Board in Washington, should attend the 13th Conference of the International Maritime Committee at London, on October 9th-11th, 1922.

A strong American delegation, consisting of Russell H. Loines, William A. Thompson, Jr., George S. Dearborn, J. Parker Kirlin, William Francis Gibbs, Charles S. Haight and Ernest Glover went to London in this connection.

The Hague text of 1921 was revised, unanimously approved, and referred to the Belgian Government for diplomatic consideration.

Immediately after the London meeting, Judge HOUGH and Mr. Beecher attended the Fifth International Diplomatic Conference on Maritime Law, held at Brussels, October 17th to 26th, 1922, as delegates for the United States, appointed by the State Department. The Belgian Government submitted to the Conference the Draft Convention for the Unification of Certain Rules Relating to Bills of Lading, which had been unanimously agreed to at the meeting of the International Law Association at the Hague (1921), at the International Shipping Conference in London (1922), and at the Thirteenth Conference of the International Maritime Committee at London (1922). Judge HOUGH presided over the sessions at which the text was considered article by article on October 19th, 20th, 21st and 23rd. The Conference then resolved itself into a series of subcommittees to revise and perfect the various texts. On October 26th, a final session was held at which the Bill of Lading Convention text was accepted, and signed for the United States by Judge HOUGH and Mr. Beecher as delegates.

In 1923, the subcommittee on texts met again at Brussels and Mr. Beecher again attended as delegate for the United States. The Bill of Lading text was considered on October 7th and 8th and was modified in various minor respects.

The text as so modified in 1923 was submitted to the Fifth International Conference on Maritime Law reconvened at Brussels on August 25, 1924, and was then signed in behalf of the United States by the American Minister to Belgium, Mr. William Phillips, on instructions of the Secretary of State, Hon. Charles Evans Hughes. The British authorities promptly set to work and within two years put the Rules into effect as legislation in the greater part of the British Empire. But other countries did not respond so quickly.

In 1923, Mr. George W. Edmonds of Pennsylvania introduced H. R. 14116, a bill to give effect to the Rules; and the House Committee on Merchant Marine held a hearing. Senator Kenneth D.

McKellar of Tennessee, as mouthpiece of the opposition, introduced S. 427 on Dec. 6, 1923, to amend the Harter Act so as to eliminate the rule of "due diligence" and require shipowners to warrant the seaworthiness of their ships at all times; but made no progress. In 1925, Mr. Edmonds re-introduced his bill as H. R. 11447, and, after a hearing, re-introduced it in amended form as H. R. 12339 and it was favorably reported to the House, but not brought to a vote before adjournment. In April, 1926, The National Industrial Traffic League filed with the State Department a brief expressing its vigorous opposition to the Convention. In 1927, Senator Borah introduced the same bill (S. 1295), and the struggle shifted from the House, where progress had been steadily blocked by the Chicago Packers who believed that they were better off under the Harter Act and still nursed the hope of modifying that Act drastically in their favor by reviving the McKellar Bill. The pressure for and against passage of the Senate Bill was great at that time. On February 26, 1927 President Coolidge, apparently thinking the time ripe for action on both the Bill and the Convention, sent the Convention to the Senate for its advice and consent, accompanied by a Report, Executive E, 69th Congress, Second Session. The Senate Committee on Foreign Relations removed the seal of secrecy usually imposed on pending treaty matters, and held a hearing on December 22, 1927, at which many parties appeared; the result was inconclusive. The Shipping Board held a hearing on January 26, 1928, and again the result was not conclusive. As legislative progress was continually stopped in one way or another, interest in the whole matter cooled. Annually thereafter Mr. White of Maine re-introduced the Bill, as H. R. 12208 in 1928, H. R. 3830 in 1929, and, after his election to the Senate, as S. 482 in 1931; but none of these was brought to hearing, much less to the stage of a report or a vote.

In 1930, progress in the matter being at a standstill due to the views of various important American shipping interests that the Convention text required clarification on several points, the Chamber of Commerce of the United States called a meeting of all interested parties in Washington. The invitation was widely extended and the meeting was well attended by representatives of all interests except shipowners. After extensive examination of the text and the cases, seven clarifying amendments were agreed upon as of essential importance, and written into the Bill. But only six of them made any changes in the Hague Rules texts; the seventh "amendment" merely

restored the "three days' notice" clause which had inadvertently been omitted from the print of the Bill. These six American amendments have all been incorporated in the Act, and their character is discussed hereinafter. The Chamber of Commerce proceedings were printed in March, 1931, under the title "Uniform Ocean Bills of Lading," and were presented to the Chamber's Nineteenth Annual Meeting at Atlantic City in April, 1931, and approved. Thereafter the Chamber of Commerce of the United States consistently gave its powerful support to this legislation, but the emergencies resulting from the depression prevented progress in Congress.

Meanwhile British resentment was rising, and in 1932 the British Chamber of Shipping actually considered a movement to repeal the British Act because of the refusal of other countries to honor their signatures to the Convention.

The Supreme Court decision of the *Isis case*, late in 1933, reversing the courts below, laid down the burdensome rule that the shipowner must either produce a vessel actually seaworthy, or else prove that his servants had used due diligence *in all respects* as a condition precedent to securing the Harter Act exoneration from errors in management and faults of navigation. It soon became evident that this rule was extending the cost of investigation and scope of testimony beyond anything previously experienced. It became essential to correct this excessive burden.

The final successful effort began on January 17, 1935, after Senator White had introduced S. 1152, embodying the text agreed upon in 1930. The Foreign Relations Committee then took up Executive E of 1927 as unfinished business and in March, 1935, brought in a report favorable to the Convention, presented by Senator Elbert D. Thomas of Utah; on April 1, the Senate gave its advice and consent to ratification and sent the Convention to the Secretary of State. A brief but violent storm was raised by parties who held the view that legislation should precede ratification; but this only served to direct attention to the fact that there was no further opposition to legislation. The State Department accordingly held the Convention to give time for legislation. Steps were immediately taken to bring Senator White's bill to a hearing, report and vote. On May 10, 1935, the Senate Committee on Commerce, with Senator Copeland presiding, held a hearing on S. 1152, and it appeared that opposition had ceased.

On May 28th, the Committee on Commerce brought in a favorable report, No. 742, to the Senate; on June 9, passage was blocked by an

unexplained objection from Senator McKellar, who continued to reflect the former opposition which had ceased. On August 16, 1935, the Senate passed the bill on the Consent Calendar, without a record vote and sent it to the House of Representatives.

On January 28, 1936, the House Committee on Merchant Marine and Fisheries, with Congressman Bland presiding, held a hearing on S. 1152, and on March 23, brought in a favorable report, No. 2218, recommending one typographical amendment in Section 13. It appeared that the Senate, in defining the term "United States," had enacted that "the term United States *included* its districts, territories and possessions." The amendment was merely to put the verb in the present tense, so as to provide that "the term United States *includes* its districts, territories and possessions." On April 6, the House of Representatives passed the bill on the Consent Calendar without a record vote, with the single amendment mentioned, and sent the bill back to the Senate for its concurrence in respect of the amendment. On April 7, the Senate concurred in the amendment and the bill was thereupon duly engrossed and sent to the President.

On April 16, 1936, President Roosevelt signed both the bill and the Convention. The bill thereby became law, and became effective, in accordance with its terms, on July 15, 1936.

The Convention was returned by the President to the Senate on April 5, 1937, in order to have the Senate concur in an "Understanding" that if there should be any divergence between the text of the Convention and the text of the Act, the text of the Act should control. The Senate advised and consented to ratification with this understanding on May 6, 1937; President Roosevelt signed the Convention again on May 25, 1937; and Mr. Hugh Gibson, the American Minister to Belgium, deposited the ratification with the Belgian Government at Brussels on June 29, 1937. The Convention consequently became effective, as regards the United States, six months thereafter, on December 29, 1937, which fact was proclaimed by the President on November 6, 1937.

COMMENTARY.

General Purpose of the Rules, the Convention, and the Acts.

The Hague Rules of 1921, the Brussels Convention of 1922-1924, and the various statutes known as the Carriage of Goods by Sea Acts, have as their general purpose the unification or standardization of the principal provisions of ocean bills of lading, "from tackle to tackle." The standardization extends to every clause concerning which agreement has been possible; and the result is that a "Hague Rules" bill of lading consists of the standardized clauses, plus such unstandardized clauses as are suited to the trade. The original intention in 1921 was to present a limited set of agreed clauses for voluntary inclusion in bills of lading, as Institute Clauses are endorsed in policies, or as the York-Antwerp General Average rules are incorporated by reference in bills of lading; had that intention prevailed, the Hague Rules clauses and the unstandardized clauses would have to be construed together. The Hague Rules clauses have, however, been given legal effect both as a multilateral Convention or treaty, and as national legislation; consequently the standardized Hague Rules clauses are paramount and wherever applicable must over-ride every conflicting clause which may be added to the bill of lading. Added and unstandardized clauses which do not conflict directly with any provision of the Convention and the Acts will be given full force and effect as agreed contract clauses, construed on the ordinary principles applicable to contracts; but added clauses which are in the nature of exceptions against liability for fault or neglect are only valid if the carrier can bear the burden of proving that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. Section 4 (2) (q).

Texts.

The only official text of the Convention is the text in the French language of which the Belgian government is the custodian. This text has been translated into English at least three times; and the translations, as might be expected, diverge slightly in the choice of words and tenses. *The earliest translation* was prepared by the Brussels Conference itself in 1922, and was acquiesced in, if not

wholly approved, by such authorities as Sir Henry Duke, president of the British Maritime Law Committee, and Judge Charles M. Hough of the United States Circuit Court of Appeals, Second Circuit and president of the Maritime Law Association of the United States. *The next translation* was made by the British government for the use of Parliament in 1924; this text was actually given the force of law in Great Britain upon being enacted as the Schedule to the British Carriage of Goods by Sea Act, 1924, and its identical phraseology has subsequently been given force of law in every part of the British Empire and Commonwealth of Nations, fronting on any sea, with the exception of New Zealand, the Union of South Africa, and the Irish Free State.* The British translation is printed in this volume beginning at page 31, being the Schedule of the Canadian Act; it is also found at 1924 American Maritime Cases 1338, and in Poor on *Charter Parties,* 2nd edition, page 309. *The third translation* was made by the American State Department in 1927 for the use of the Senate in advising upon and consenting to ratification of the Convention; it is printed in this volume facing the official French text, beginning at page 45. A French translation of the American Act of 1936 will be found at 34 Dor: *Revue de Droit Maritime Comparé* 399.

Some Problems Suggested by the New Laws.

Some of the puzzling situations resulting from the Convention and the Acts passed in accordance with it may be briefly stated as the following:

Is it valid to agree that a charterer who takes a bill of lading shall load or discharge his cargo at his own risk and expense?

What is the status of arbitration agreements?

How much of the bill of lading remains effective after a deviation?

What is the position when goods are trans-shipped?

What is the shipper's right to demand a bill of lading?

What is the sanction or penalty for failing to insert the clause paramount?

What is the status of exceptions under Section 4 Subsection (2) (Q)?

* The Rules do not seem to prevail in the following places possessing seaports which are, in one form or another, associated with Britain: Egypt, Iraq, Ireland, Malta, New Hebrides, New Zealand, Samoa, Shanghai, Togoland, Wei-hai-wei, Union of South Africa, Southwest Africa, New Guinea.

What is the scope of the shipper's exception clause?

Are demurrage agreements valid?

What law now applies to deck cargoes?

When two slightly different Acts or versions of the Convention may be applied to a case—as the law of the place of shipment or the law of the place of destination—which Act shall prevail?

Are the Divergencies Between the Texts of the Acts and the Text of the Convention of any Material Consequence?

The American Act adds six provisos to the Convention text. It abandons the gold clause—Article IX. Furthermore, it differs from the British (or second) translation in several minor particulars, no one of which is thought to be significant. In explanation of the American textual changes and additions, the U. S. State Department issued a memorandum, which is reproduced at the end of the Commentary.

The first phrase of Article III, Section 2 of the Convention and the British Schedule reads: *Subject to the provisions of Article IV.* There is no Congressional explanation for the omission of these words. Article IV (U. S. Section 4) states the rights and immunities of the parties. The ordinary canons of statutory construction would require the Act to be read and construed together, as a whole; so construed, the "responsibilities and liabilities" stated in Section 3 are necessarily qualified by the "rights and immunities" stated in Section 4. The deliberate excision of the phrase might indeed be thought to argue a Congressional intention to make some significant alteration in the scheme of the Rules. But the only possible result of such an alteration would necessarily be the total abnegation of Section 4, which Congress enacted, and to which due meaning must be assigned. If Section 3 (2) is read without reference to Section 4, the carrier must "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried," without benefit of any of the exceptions deliberately enacted by Congress in Section 4; Section 3 (2) as a bare fiat makes the carrier the insurer of the safe delivery of the goods. Nothing in the record of hearings, nor in the reports, indicates that Congress had any such intention. It seems safe to say that the omission of the opening phrase was an act of revision of draftsmanship, without any significance in the interpretation of the Act as a whole.

The Canadian Act abandons the gold clause; its Schedule is otherwise the same as the Schedule of the British Act of 1924; see the note concerning the Canadian Act, *post.*

The Schedule of the Newfoundland Act is like the Schedule of the Canadian Act, except that it retains the gold clause.

Inasmuch as sixteen years' experience under the British Act has failed to reveal or suggest any significant divergence between the Schedule of that Act and the Convention, it would appear to be proper to conclude that the differences between the first (Brussels) translation into English and the second (Parliamentary) translation are of no legal importance. Should it be developed hereafter that a significant difference does exist, the resulting situation would affect the British, Indian, Australian, Canadian and Newfoundland Acts and all the British Colonial Carriage of Goods by Sea Ordinances, and would not be peculiar to the Canadian Act.

Terms Defined.

The Act contains two groups of definitions; the first, in Section 1, defines *carrier, contract of carriage, goods, ship,* and *carriage of goods* in the language of the Convention; the second, in Section 13, defines *United States* and *foreign trade,* words not defined in the Convention.

In addition, the bill of lading may freely contain such further definitions as may be desired, so long as the effect of the Act is not thereby altered in favor of the carrier or against the interest of the shipper.

Thus the uniform North Atlantic bill of lading, clause 2, defines the following expressions: *ship, carrier, shipper, consignee,* and *charges.* See page 82.

The definition of the expression "carriage of goods," defined in Section 1 (e), has occasioned some controversy; it seems to be settled that the term covers the period from the moment when the ship's tackle is hooked onto the cargo for loading, until the moment when the ship's tackle is unhooked in the process of discharging. The views that the Rules cover from the last resting-place in warehouse or on pier to the first resting-place after discharge, or from ship's rail to ship's rail, or from deck to deck, have been discarded. It would of course have been more satisfactory if the expression "tackle to tackle" had actually been used in the Rules. It is settled law that the carrier may terminate its carrier liability at the end of the ship's tackle. *Smith* vs. *Brittain,* 1903 (SDNY), 123 Fed. 176; *Portuguese Prince,* 1913 (SDNY), 209 Fed. 995; *C. Lopez y Lopez,* 1927 A. M. C. 275, 218 N. Y. A. D. 660; *Bank of California* vs. *I. M. M. Co.* (2CCA), 1933 A. M. C. 719; 64 F.(2d) 97, certiorari denied. Grain handled in bulk at elevators appears to be considered as loaded on the ship when it emerges from the spout into the hold; and as discharged when it passes up the suction pipes and beyond the control of the ship, at which moment the possessory lien is usually lost. The same is probably true of other commodities handled in bulk by automatic loading and discharging machinery. See the *R. G. Winslow* (1860) Fed. Cas. No. 11,736 (D. Wis.); ROBINSON on *Admiralty,* (1939) p. 492.

Lighterage is discussed hereinafter.

The term "United States" includes the Canal Zone at Panama, Alaska, Hawaii, Midway, Wake, Guam, the Philippines (until the Philippine legislature shall enact a law to the contrary), American Samoa, Puerto Rico, the Virgin Islands. Commerce between all of these places is domestic and not foreign commerce, and hence is not governed by the Convention nor by the Act, unless the carrier optionally issues a bill of lading agreeing to adopt the provisions of the Act.

The Philippine legislature, far from availing itself of this opportunity to avoid the effect of the Act, has adopted an Act expressly accepting the Carriage of Goods by Sea Act as the law of the Philippine Islands for foreign trade. The text of the Philippine Act appears in Appendix F.

To What Bills of Lading Do the Acts Apply?
The U. S. Act of 1936.

The opening phrase enacts "that every bill of lading * * by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this Act." Section 13 provides that "this Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." The two provisions mean the same thing.

The Convention, Article 10, is a promise that each High Contracting Party will apply the Convention to every (ocean) bill of lading issued within its territory. The Additional Protocol (paragraph 2) permits any Party, upon ratifying, to reserve its coasting trade. The United States, in depositing its ratification, did not expressly reserve its coasting trade; but it did state its "understanding" that the Act of 1936 should be paramount to the Convention if

the two should conflict. The Act of 1936, Section 13, provides that the Act shall not apply to American domestic trades unless by agreement of carrier and shipper. The "understanding" by an obvious but indirect method, thus necessarily accomplishes the same result that would have been secured by a direct reservation of the coastal and domestic trades. It may be noted that American coastwise and intercoastal bills of lading may be, and usually are, negotiable; whereas if the American coastwise trade had been reserved by the method of electing to make use of the protocol, coastwise cargoes would be "special cargoes" under Section 6 and negotiable bills of lading would not be possible. This threatened inconvenience has thus been avoided.

The U. S. Act of 1916 (Pomerene Act) applies to all *outward* bills of lading, Section 1, equally with the Act of 1936, its effectiveness having been specially preserved by Section 3 (4) against the possibility of an implied repeal; but it does not apply to import bills of lading. *C. & O. Ry.* vs. *State Natl. Bank* (1939) 133 S. W.(2d) 511 (Ky).

The Canadian Act of 1936 applies to all outward bills of lading and to all domestic water-carriage bills of lading; it does not apply to inward bills of lading. Domestic coastwise carriers may, if they wish, carry any kind of cargo on "special conditions" under Article 6.

The Newfoundland Act of 1932 is in these respects the same as the Canadian Act; the option of "special conditions" under Article 6 is expressly extended to the trade between the South Coast and Cape Breton. Canada seems to have failed to grant the reciprocal privilege to that trade.

The Clause Paramount is discussed hereinafter.

Conflict of Laws.

As the Convention and the Acts are primarily intended to regulate the relations between shipowners, carriers, shippers and consignees, bankers and underwriters in foreign trade, the question arises in every case, what law applies?

Is the Convention Binding on Individuals? The Convention is a treaty, and its force and effect depends upon the rules of law prevailing in each government as to the manner in which treaties become effective. Treaties are ordinarily merely contracts between sovereigns, and are in most countries not a part of the private civil law by which private persons are bound. In the United States, under our Constitution, a different rule prevails, and a treaty or convention is part of the "law of the land" equally with acts of Congress. But the Senate and the President, in ratifying this Convention have expressed an "understanding" that, if the provisions of the Convention and the provisions of the Carriage of Goods by Sea Act, 1936, should conflict, the Act shall prevail over the Convention. Consequently this Convention, while undoubtedly a part of the "law of the land" throughout the United States and its possessions, is not directly binding as a rule of civil conduct upon individuals; the rule of civil conduct is that laid down by the Act of 1936. The result is substantially like that obtained in England, where the Rules are binding on individuals because of the Act of Parliament of 1924, and the ratification of the Convention by the King in 1931 is of no direct importance to any individuals. Canada and Australia have not ratified at all, but merely enacted legislation. The general result appears to be that the Convention, as such, is merely an intergovernmental promise of an executory nature, to enact the required legislation (Article 10); and that it cannot be made the basis for an assertion of private civil rights as between one individual and another, unless so proclaimed, as has been done in France and in Italy.

Reciprocity Clauses.

Very little has been done in either American or British statutes or in contract clauses to resolve the question of conflict of laws. Thus in *The Steel Inventor—B 18*, 1941 A. M. C. 169 (D. Md.), where a bill of lading covering cargo shipped in India and discharged in the United States contained two clauses paramount—one referring to the Indian and the other to the U. S. Carriage of Goods by Sea Act—it was important to know whether to assess damages on the basis of £100 or $500. Neither statute gave any indication as to the solution of the problem, and there was no bill of lading clause concerning it. The court, remarking that there could not be two clauses paramount operating simultaneously, applied the U. S. Clause (p. 187).

The approach which has been adopted by Sweden, Norway, Denmark and Finland, and it seems by France may be commended. These countries have, in their legislation making the Rules effective for their export trade, provided also that, in their import trade, the Rules will be applied to all bills of lading originating in countries which have ratified or adhered to the Convention; this, however, does not give

force to the convention, but gives effect to the Swedish, Norwegian, Danish, Finnish and French legislation.

In What Respect is the Act Binding on Individuals? The American Act, following the long-established precedent of the Harter Act of 1893, expresses a rule of public policy applied alike to export and import bills of lading in American trade; the American courts will apply the Act, as a clause paramount, to bills of lading, no matter where made, if the bill of lading is a document of title and is the contract of carriage, and if the goods are moving to or from the United States or its possessions. Consequently the question whether the law of the place where the bill of lading contract is made should be given effect would seem to be of little practical interest in American law suits.

It would seem to follow, as a corollary, that the American courts will not apply the American Act to bills of lading covering the carriage of goods between foreign ports, whether in American or foreign ships.* Such bills of lading will presumably be given effect according to their apparent tenor, unless a party pleads and proves that some version of the Hague Rules was the law at the place where the bill of lading was issued, in which event it would seem that if the country where the bill of lading was issued has also ratified or adhered to the Convention, the American court should, as a matter of comity, read that version of the Rules as an implied clause paramount.

If the parties incorporate a Hague Rules clause in a foreign bill of lading to which the Rules do not apply *proprio vigore*, an American court will give them effect like any other contract provision; thus in the *Carso*, a libel for cargo damaged between Italy and the United States in 1926, when neither country had ratified or legislated the Rules, the bill of lading contained a clause incorporating the Rules of the British Act of 1924; and the American court gave effect to the clause requiring suit to be brought within one year. *The Carso; Switzerland-General Ins. Co.* vs. *Nav. Libera Triestina* (2CCA), 1937 A. M. C. 1078, reversing (SDNY) 1936 A. M. C. 405.

The Canadian Act, unlike the American, does not apply *proprio vigore* to import bills of lading; it regulates only export bills and domestic bills. Import bills will therefore be construed according to the tenor of the bill; where the bill actually refers to some form of the Hague Rules, the Rules are applied by the Canadian courts; thus in

* *Fri*, 2CCA (1907), 154 Fed. 333, affirmed 210 U. S. 431. *Miguel di Larrinaga*, SDNY (1914), 217 Fed. 678.

the *Lady Drake case*, where cargo shipped in Barbadoes was damaged en route to Canada (prior to enactment of the Canadian Act of 1936), the bill of lading contained a reference to the Barbadoes Ordinance giving legal effect to the Convention, and the Canadian courts applied the Barbadoes Ordinance; *Canadian National Steamships* vs. *Bayliss*, 1937 A. M. C. 290, 1937 S. C. R. 261 (Dominion of Canada, Supreme Court), affirming 1935 A. M. C. 427, 1936 A. M. C. 998. The Canadian law was further expounded in *The Hurry On*, which is next discussed.

Is the "Clause Paramount" imperative or has the legislature merely directed its use? The highest court in the British Commonwealth of Nations has decided that the requirement of the statutes that "every bill of lading issued in" the legislating country "shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by" the enacting statute or ordinance is merely directory and not imperative. *The Hurry On* (*Vita Food Products Inc.* vs. *Unus Shipping Co., Ltd.*) 1939 A. M. C. 257, [1939] A. C. 277, 63 Ll. L. R. 21, 55 T. L. R. 402. In that case, a bill of lading was prepared by the shipper of a lot of herrings from a port in Newfoundland bound for New York, and signed by the master's agent, omitting the statement required by Section 3 of the Newfoundland Act that the bill of lading should have effect subject to the provisions of the Rules as applied by the Act. (The text of Section 3 is printed at page 40, *supra*.) At the time in question, the Rules had not yet been enacted either in the United States or Canada; but they were in effect in both Newfoundland and England, and the bill of lading contained an express statement that it should be governed by English law. Thus the Rules, and the requirement that the Clause Paramount should be incorporated in the bill of lading, were legally effective in the place where the bill of lading was issued and in the place where the court of last resort was sitting; but were not locally in effect in the port of destination, nor in the place (Nova Scotia) where the litigation began. The Nova Scotia courts had, of course, no public policy against the clause by which the parties elected to be governed by the law of England.

The cargo was damaged by an error in navigation (stranding while seeking refuge in a gale), and litigation ensued at the place of stranding in the Province of Nova Scotia, within the Dominion of Canada. The appeal ran, in due course, to the Privy Council in London, which

held unequivocally that the requirement of the Clause Paramount was merely directory and not imperative. Hence it gave effect to the bill of lading as though it had contained the missing Clause Paramount, and accordingly exonerated the carrier from liability for "damage resulting from act, neglect or default of the servants of the carrier in the navigation of the ship."

The Lords of the Judicial Committee of the Privy Council expressly disapproved of the reasoning of the case of *The Torni* [1932] Probate 27, 78; 41 Lloyds List L. R. 174, 43 Lloyds List L. R. 78, decided by the Court of Appeal of the High Court of Judicature of Great Britain. While the Privy Council is not competent to hear appeals from the Court of Appeals, it is, like the House of Lords and the Supreme Court of the United States, a Court of Last Resort, and its views as to the requirement of the insertion of the Clause Paramount are probably the last word on the subject, not only for the British Dominions and Colonies, but also for Great Britain and, it is submitted, they may be so regarded for the United States.

The conclusion accordingly is that an enactment of the Rules, like the enactment of the Harter Act, expresses the over-riding public policy of the legislature, so that every bill of lading to which the Rules apply, issued in the territory of an enacting State, necessarily has the Rules read into it in all respects. See page 134.

In support of that view, the Privy Council, indeed, cited the opinion of the Supreme Court of the United States in applying the public policy of the U. S. to the case of *The Montana*, (1889) 129 U. S. 397.

The Swedish and French formula offers a new solution of this theoretical difficulty; these countries have adopted the Convention in such a form that inward cargoes, imported under bills of lading which attempt to circumvent the Carriage of Goods Act by failing to incorporate the clause paramount, shall nevertheless be judged according to the Convention whenever the bill of lading is issued in a country which has ratified the Convention. Thus France and Sweden will deem the clause paramount to be incorporated in every bill of lading issued in the United States for carriage of goods to France or Sweden, because the United States has ratified the Convention; but will not deem it to be incorporated in a bill of lading issued in Canada or Newfoundland,* because Canada and Newfoundland * have not ratified

* Since Newfoundland has reverted from Dominion to Crown Colony status, it may well be considered that the British ratification of the Convention in 1930 now extends to Newfoundland as to other parts of the British Empire whose foreign affairs are conducted by London.

the Convention. French and Swedish courts will deal with Canadian bills of lading according to their apparent tenor, even though the parties, in issuing the bill of lading, violated the law and policy of the country of issue.

If the Convention is both ratified and enacted into domestic law as a statute, every possible method would seem to have been adopted of preventing the makers of bills of lading from ignoring the statute and continuing the old objectionable diversity of bill of lading contracts and law, which has given rise to so much complaint and which the Convention and the uniform carriage of goods by sea statutes are intended to correct.

The difficulty above referred to is especially acute in every country which has adopted the Convention as legislation merely, without accompanying the legislation with a ratification. The principal countries now so affected are Australia, Canada and India.

The situation might be clearer if the Acts should provide, not that the bill of lading shall refer to the Rules, but that the bill of lading shall *be deemed to* refer to them.

Adaptation of the U. S. Act of 1936 to the Harter Act of 1893.

The Hague Rules affect commerce only "from the time when the goods are loaded on to the time when they are discharged from the ship"—that is to say, from tackle to tackle. Article I (e). The same phrase is used in the American Act, Section 1 (e) and the Canadian Act, Schedule, Article I (e). The Convention and the Acts do not regulate the bill of lading contract before the goods are loaded, nor after their discharge. Article VII.

The Harter Act of 1893 has not been repealed nor amended.* Article 12. It has merely been superseded "from tackle to tackle." It continues in full force and effect, as heretofore, in all relations except the two following:

1. Foreign commerce in cargo (other than livestock) carried under-deck from tackle to tackle;

* It was often recommended that the Harter Act should be amended to provide (1) a $500. per package limit on value clauses and (2) one year for suit: Amer. Bar Assn. Comm. on Commerce, 1929 Report, p. 149. But this was never done.

2. Domestic commerce at the option of the carrier, provided the bill of lading contains an express statement that it shall be subject to the Act of 1936. Section 13, fourth sentence.

These two situations in which the Harter Act is superseded would appear to include almost all the cases which can give rise to claims and suits. For practical purposes, therefore, the Harter Act and the case-law growing out of the peculiar phraseology of its Section 3 (culminating in the *Isis case*)* may therefore be left out of view. But as it may come into play under some circumstances, it seems necessary to consider the differences between the Harter Act and the Carriage of Goods Act, in order to avoid surprises.

(1) The period during which the negligence clause of the Harter Act, Section 3, operates, and during which the prohibitions of Sections 1 and 2 limit freedom of contract is well-settled: it begins when the vessel, having already loaded, "breaks ground" and begins the voyage,† and it ends after the vessel has terminated the shipper-carrier relation by delivery of the cargo. It may thus apply until the goods reach a warehouse, unless the contract provides for delivery on the quay or at the end of the vessel's tackles.

The Act of 1936 operates during a slightly different period: it takes effect before the Harter Act does—from the moment of loading, not from the moment of sailing; its statutory effectiveness always ends when the goods leave the ship's tackle, and it does not regulate the handling and porterage, the delivery and the warehousing thereafter. While it is difficult to see how the Harter Act can still have any effect at the beginning of the sea carriage, it is evident that it may occasionally apply to situations arising alongside the ship at the end of the voyage, after the tackles have been unhooked but before porterage and delivery have been accomplished.

(2) In the interests of simplicity, it is of course extremely desirable that the entire ocean carrier-shipper relation should be governed by one statute, from the receipt of the goods for shipment until their delivery at the end of the carriage. While neither the Harter Act nor the 1936 Act takes effect *proprio vigore* at the moment when the goods are received for shipment, and while the common or admiralty law controls up to the moment when the ship's tackles are

* *The Isis* (*May* vs. *Hamburg*), 290 U. S. 333, 1933 A. M. C. 1565.

† *Higman* vs. *Willowpool* (SDNY), 1935 A. M. C. 1292, affirmed without opinion (2CCA).

hooked on for the purpose of loading, the parties may undoubtedly agree to apply the terms of either Act instead of the common or admiralty law; and this is usually done in the bills of lading now in use.

(3) At the termination of the voyage, the situation may be a little more difficult, because the Harter Act, which may apply after the 1936 Act has ceased to apply at the ends of the tackles, forbids a voluntary agreement upon any negligence clauses exceeding what is allowed in Section 3. And Section 12 of the 1936 Act has expressly declared the continued authority of the Harter Act whenever applicable beyond the end of the ship's tackle.

(4) If the two Acts should happen to conflict, it seems impossible to predict how the dilemma could be solved. The principal conflict is due to the rule of the *Isis case*, that for the purposes of the Harter Act the carrier is cast in damages if there is any unseaworthiness, even though there is no causal connection between the unseaworthiness and the loss. A case of this nature will, however, rarely if ever occur after the goods have been taken out of the ship. The dilemma might, of course, readily be solved by abandoning the rule of the *Isis* and adopting that of the *Spartan* (which the *Isis* overruled), that there is no liability unless there is causal connection. The fact that Congress has reversed the *Isis* rule in respect of foreign commerce encourages the hope that the Supreme Court might, if the question were presented again, abandon this rule for domestic commerce as well, particularly as any carrier may now freely escape from the *Isis* doctrine, even in domestic commerce, by stipulating that he will carry under the Carriage of Goods by Sea Act. It would seem unreasonable to deny the validity of a contract constructed in conformity with the public policy declared by the Act of 1936, in order to give effect to the different view of public policy declared by the courts in construing the Act of 1893. Hence the practice is to agree that the provisions of the Act of 1936 shall apply throughout the period when the shipper-carrier relation exists, and not merely from tackle to tackle, The bill of lading is simplified by this practice, and the likelihood of litigation as to whether the loss occurred under the one Act or the other is thereby reduced. Of course it would have been simpler to repeal the Harter Act, as Canada and Australia have repealed their antecedent Water Carriage of Goods Act; and it may in the course of time be found that this can be done after the fears attending the supposedly difficult transition have subsided.

(5)* The essential theoretical difference between the Harter Act and the Hague Rules or Carriage of Goods by Sea Acts is that the negligence or exception clause of the Harter Act—Section 3—is conditional: it never operates to exonerate the carrier unless due diligence has been used to make the ship seaworthy *in all respects*, regardless of causal connection; whereas the exception clause of the Hague Rules—Article 4—is positive; it always operates to exonerate the carrier unless due diligence has not been used in some respect proximately causing or contributing to the loss. While both the Harter Act and the Act of 1936 are statutory negligence clauses to which the shipper and carrier must conform, the Harter Act is expressed in a conditional way, whereas the Act of 1936 is expressed to declare the law.

The interpretation of the Harter Act as above stated was not settled until 1933. The question did not disturb the appellate courts until after the Great War; and the issue was sharply presented when the Judges of the enlarged Circuit Court of Appeals for the Second Circuit took opposing views as to the proper interpretation. In the *Spartan* ** the Court, speaking by Judge AUGUSTUS N. HAND, with the concurrence of Judges MANTON and CHASE, held that the Harter Act expression "seaworthy in all respects" meant merely in all respects causally connected with the loss; whereas in the *Elkton* § the Court, speaking by Judge LEARNED HAND, with the concurrence of Judges SWAN and CHASE, held that the expression must be read literally, regardless of causal connection. The *Isis* appeal was heard by the CCA bench which had sat in the *Spartan case*, and it followed that decision; † but the Supreme Court, reversing the *Isis* (sub. nom. *May* vs. *Hamburg*) ‡ adopted the view of the *Elkton*. In consequence of this severe rule, the carrier or shipowner had in every cargo damage case to be ready to answer and defeat with preponderant proof of due diligence any allegation of unseaworthiness concerning any and every detail of his ship, regardless of the presence or absence of causal

* Passage cited verbatim in ROBINSON on *Admiralty* (1939), p. 512, n. 95, and in BENEDICT on *Admiralty* (6th ed., 1940) sec. 95; and quoted in *The San Guiseppe*, 1941 A. M. C. 315, (E. D. Va.).

** 1931 A. M. C. 1, 47 F.(2d) 189, 23 Dor 308.

§ 1931 A. M. C. 1040, 49 F.(2d) 700, 24 Dor 375, 40 Lloyds List Law Reports 263.

† 1933 A. M. C. 290, 63 F.(2d) 248.

‡ 1933 A. M. C. 1565, 290 U. S. 333, 70 L. Ed. 63, 30 Dor 264, 48 Lloyds List Law Reports 35.

connection between the object criticized and the damage actually suffered by the cargo.

The Act of 1936 put an end to this harsh doctrine in the American foreign trades, and re-established the rule stated in the *Spartan* case, by providing that:

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness *unless caused by* want of due diligence on the part of the carrier to make the ship seaworthy," etc.

It is a curious quirk of legal history that the extreme interpretation of the Harter Act was not actually declared by the highest courts until some ten years after the commercial interests of the world, meeting at The Hague, in adopting the general theory of that statute, had altered the phraseology so as to require that the unseaworthiness complained of should have a causal connection with the loss; and that the long delay of the American legislature in enacting The Hague Rules should have given time for the American courts literally to declare the very doctrine which the assembled commercial interests at The Hague had already discarded.

(6) An important result of this difference between the structure of the Harter Act and the Carriage of Goods by Sea Act 1936 is that the texts of the well-known *Jason* clause (concerning general average contributions after a negligent stranding, etc.) and of the more recent "Both-to-blame" clause (designed to obviate the inconvenient result of the *Chattahoochee* * case) must be rephrased. The new forms of these clauses, which it is essential to insert in all bills of lading likely to pass under the scrutiny of the American courts, will be found in the Uniform North Atlantic bill of lading, at pages 86 and 85 respectively.

The Coastwise Option. It may be thought somewhat surprising that the coastwise trade, and more especially the intercoastal trade which is really a long-haul overseas service, has been so slow to abandon the Harter Act form with its heavy burden, imposed by the *Isis case*, of proving due diligence and/or actual complete seaworthiness *in all respects*. Yet occasional cases, hard fought at all points, show that the burden can be met.

In *The Iowa*, 1938 A. M. C. 615 (commissioner's report), 1941

* *The Chattahoochee* (1899), 173 U. S. 540.

A. M. C. 111 (D. Ore.), a large intercoastal freighter attempted to cross the Columbia River Bar outward bound on a stormy night and was driven ashore and wrecked with the loss of all on board. Attacks were made on the adequacy of her charts, compasses, supply of notices to mariners, steering signal system, telemotor steering device, trim and list, engine room equipment, which the court thought might be in considerable part makeweights. Her owners defended her seaworthiness or their exercise of due diligence successfully as to all but two, and while therefore denied complete exoneration were granted limitation of liability on their showing of absence of privity or knowledge as to those two reasons for liability.

The *Ruth C.* was a 63-foot cargo motorboat in the Seattle-Alaska trade and was lost when a large log, seen in her path by the lookout, and which she turned sharply to avoid, struck her side as she listed while turning and smashed a small porthole through which enough water entered to prevent her from righting. Attacks were made on the porthole (which had no iron doubling plate), the lack of a licensed pilot, instability with the deckload carried. Her owners undertook to prove actual seaworthiness and were successful in the highest State Court. 1941 A. M. C. 376, (Sup. Ct. of Wash.).

If coastwise trade is still conducted under the Harter Act, without taking the benefit of the option to stipulate for the Carriage of Goods by Sea Act, the old forms of Jason and Both-to-blame clauses must be used as heretofore. The Harter Act form of Jason clause will be found in Congdon on *General Average,* 2nd edition, pages 37 and 48; and Poor on *Charter Parties,* 2nd edition, page 298. The Harter Act form of Both-to-blame clause will be found at the end of the *Toluma Sucarseco* decision, 1935 A. M. C. 418.

Adaptation of the Act of 1936 to the Federal Bill of Lading Act of 1916 (The Pomerene Act); and also to the Uniform and Other State Bill of Lading Acts.

The *Proviso* of Section 3 (4), which saves the operation of the federal Bill of Lading Act of 1916 (commonly referred to as the Pomerene Act) is one of the six amendments agreed at the Chamber of Commerce Conference in 1930. This Proviso does not alter the Rules, but merely preserves a necessary legislative correction to the body of American case law. Prior to 1916, many courts, including the federal courts, had declared that the act of an agent of a carrier in

issuing a bill of lading without actually receiving any goods was *ultra vires,* and not binding on the carrier even when the bill of lading passed into the hands of innocent purchasers for value.* Such was not the law in most other countries; and these unfortunate decisions impaired the value of American bills of lading and eventually made possible a series of frauds, especially in the cotton trade, which had world-wide repercussions.

The situation was first attacked through the Liverpool Cotton Bill of Lading Conference, 1907. This resulted in the voluntary agreement of August 4, 1911, the text of which is printed at page 93 of this volume. It was also approached by means of the Uniform State Bill of Lading Act (1909), which was adopted by sixteen States between 1910 and 1915, and later by twelve more. A central bureau for the certification of true bills of lading was also established for the cotton trade. The final legislative action establishing the carrier's liability for the acts of its agents authorized to sign bills of lading and overthrowing the *ultra vires* doctrine was Section 22 of the Pomerene Act of 1916. So vital a commercial statute had to be preserved against the hazards of judicial modification or repeal; the new Act of 1936 had to contain a saving clause extending at least to Section 22 of the Pomerene Act.† The *proviso* indeed goes further; it preserves the entire Pomerene Act from the possibility of an implied repeal.

It should be noted that the Pomerene Act, unlike the 1936 Act, does not apply to bills of lading issued abroad for carriage of goods to the United States.

A pre-dated bill of lading issued in Italy was said, in the *Carso* (2CCA), 1937 A. M. C. 1078 at 1083, to be of no consequence, when the goods were actually shipped within three days, and the cargo owners suffered no prejudice because of the pre-dating. The practice is, however, a dangerous one for carriers who are subject to Section 22 of the Pomerene Act.

Two possible conflicts between the Act of 1916 and the Act of 1936

* *Pollard* vs. *Vinton* (1881), 105 U. S. 7; *Friedlander* vs. *T. & P. Ry.* (1889), 130 U. S. 416; 32 L. Ed. 991. A shipowner is not necessarily responsible for the bill of lading issued by a charterer who assembles a cargo. *Akt Bruusgaard* vs. *Standard Oil Co. of New Jersey* (1922), 2CCA, 283 Fed. 106.

† If the ship is under charter, and the holder of the bill of lading is not the charterer, such holder's rights depend upon (1) the terms of the charter, (2) his knowledge of the charter, and (3) whether the bill of lading incorporates the charter. Poor on *Charterparties,* 2nd ed. (1930) sec. 25.

are apparent: (1) Respecting the effect of the bill of lading as a receipt for merchandise, the 1936 Act provides, in Section 3, paragraph 4, that

> "such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described."

The 1916 Act provides, in Section 22, that

> "if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor * * * the carrier shall be liable * * * for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

Applying this Section in the case of *Strohmeyer & Arpe Co.* vs. *American Line*, 1938 A. M. C. 875, 97 F.(2d) 360 (2 CCA), where a cargo checker on a pier connived with a truckman to give fraudulent receipts for cargo trucked to the pier but never delivered to the carrier, it was held that Section 22 has no application to a holder of a bill of lading who has not advanced value on the faith of the bill of lading.*

The 1936 Act, Section 3, Subsection 4, makes the bill of lading merely *prima facie* evidence, whereas the 1916 Act, Section 22, makes the bill of lading, in the hands of a bona fide purchaser, absolute evidence. Evidently it is still merely *prima facie* evidence as between the carrier and the shipper.

(2) The 1936 Act also provides, in Section 3, paragraph 5, that the shipper "guarantees to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him." The 1916 Act provides in Section 20 that if the goods are loaded by the carrier, the carrier shall count the packages or ascertain the kind and quantity of bulk goods; and in Section 21 that if the goods are weighed, loaded and counted by the shipper, a true statement to that effect shall relieve the carrier of responsibility in those respects. The 1936 Act, Section 11, provides that if the weight of

* In the district court it was said that the bill of lading considered as a receipt does not operate as an estoppel between the original shipper and the ship. *Strohmeyer* vs. *American Line*, (SDNY), 1937 A. M. C. 273. This view was affirmed.

bulk cargo is ascertained or accepted by a third party, and the fact is stated in the bill of lading, neither the carrier nor the shipper shall be liable because of an error. These provisions can be harmonized. As between shipper and carrier, the shipper guarantees his statements. As between the carrier and the rest of the world, the carrier guarantees the statements contained in the bill of lading, unless he can relieve or reimburse himself by reason of some one of the provisions above described.

As to the Uniform State Bill of Lading Act, and other State laws, the federal Act of 1936, like its predecessor the Harter Act of 1893, undoubtedly occupies the constitutional field; the laws of the states may therefore not be applied to any ocean bills of lading in foreign commerce, nor even to bills of lading for carriage of goods by water in domestic commerce on the navigable waters of the United States. The only field in which State bill of lading laws can operate on bills of lading for water transportation would seem to be upon wholly intra-state lakes which are not connected with the navigable waters of the United States.

The Interstate Commerce Act and the Through Export Bill of Lading.

There is no conflict between the 1936 Act and the Interstate Commerce Act of 1887, as amended,* under which the uniform Through Export Bill of Lading has been developed by the American railways and approved by the Interstate Commerce Commission. The 1936 Act expressly provides, in Section 10, that when the Interstate Commerce Commission authorizes any bill of lading relating to carriage of goods by sea, such bill of lading shall be subject to the provisions of the 1936 Act. The possibility of a conflict is thus eliminated. The Commission has not acted to require the Through Export Bill of Lading to conform with the Act of 1936.

Canada: Adjustment to the Previous Law.

In Canada, the former Water Carriage of Goods Act of 1910 (reenacted in 1927) has been wholly repealed, and is not longer in effect; consequently the situation is simply that the transportation contract is governed by common law as modified by the Canada Shipping Act, § 657 † prior to loading and after discharge, when the new Act is not

* Appendix E, note.
† Appendix D, post.

applicable *proprio vigore*. It is deemed that the parties may, if they wish, agree to apply the provisions of the Act to their relations before loading and after discharge, i. e. throughout the period when the carrier-shipper relation exists. See the discussion of lighterage, post.

Newfoundland: Adjustment to the Previous Law.

The former "Liability of Carriers by Water Act" (Consolidated Statutes, Third Series, 1919, Chapter 187) has been wholly repealed. The resulting situation would seem to be the same as that in Canada.

The Obligation to Issue a Bill of Lading—Received for Shipment Bill of Lading—"Shipped" Bill of Lading.

One of the complaints to which the Harter Act gave heed in 1893 was that shipmasters and carriers often failed or neglected to issue any bill of lading at all. The technical reasons why ships were frequently pressed for time and sailed without issuing bills of lading have been said to inhere in the lack of time for checking the receipts against the ladings after completion of loading; lack of facilities in ports where ships load from lighters in open roadsteads, sometimes in bad weather; the organization of "through" shipping arrangements between railroads and ocean carriers which did not require the intervention of a shipper's agent at the seaport; the method of conducting the sale, shipment and financing of certain important trades, such as the American cotton trade and the Australian and New Zealand wool trades. It was also said that a bill of lading issued after the ship had sailed failed of its purpose if it could not reach the consignee by mail before the carrying ship reached port.* The legislatures have now silenced these arguments by requiring that a bill of lading with certain minimum statements must be issued to the shipper on demand, after the goods have been received in the carrier's charge. Sec. 3 (3).

While the Act of 1936 does not prohibit a carrier from issuing a bill of lading before the condition and apparent order of the goods has been ascertained, every carrier operating in the United States must at this point consider Section 22 of the Pomerene Act, according to which a carrier is liable to the holder of the bill of lading if the goods do not correspond to their bill of lading description. As to the situation in Canada, see the Notes on the Canadian Act, post.

* W. R. Bisschop. "Received for Shipment Bills of Lading" (1923), Laval Impr. Barneoud, pp. 1-27.

Is it still possible to have a situation like that of the *Esrom* (2CCA), 272 Fed. 266? In that case, the charterer assembled a cargo, giving charterer's receipts, and stowed a substantial part of it in the holds. He then ran out of money and failed. The ship never sailed, but presently discharged the cargo and notified the shippers to come and get it. The Convention and the Acts empower the shipper to demand from the master or carrier's agent a "shipped" bill of lading as soon as the goods are on board. Such a document is more than a receipt; it is also the document of title and the contract of carriage. The master can presumably unlade the goods prior to any demand for a "shipped" bill of lading; but after the goods are loaded and the demand for the bill of lading is made, may he still refuse to issue the document and unlade the goods? There is no authority on this point at present; it would seem reasonable to permit the master to unlade the goods after demand made for a bill of lading, if such action is taken promptly.

Compliance with the shipper's demand for a bill of lading is greatly facilitated by allowing the "custody" or "received for shipment" bill to be turned into a "shipped" bill of lading by means of a rubber-stamp naming the ship and the date.

The settled law that the bill of lading, though issued after the goods are shipped, is the formal, effective expression of the contemplated contract, unless it actually contradicts the previous agreement, does not appear to be disturbed. *Caledonia* (1894), 157 U. S. 124, *Calderon* vs. *Atlas* (SDNY, 1894), 64 Fed. 874, reversed on other grounds, 170 U. S. 272; *Northern Pacific Railroad* vs. *American Trading Co.* (1904), 195 U. S. 439, 49 L. Ed. 269.

If a shipper should agree not to ask for a bill of lading, his agreement apparently cannot be enforced against him; if he demands a bill of lading in violation of his agreement, it must be issued to him in compliance with the Rules.

Private Carriage.

In interpreting the Harter Act, the American Courts developed a line of cases, of which the *G. R. Crowe* is the most commonly cited example (1924 A. M. C. 5, 294 Fed. 506, 6 Dor 344 (2 CCA), certiorari denied, 264 U. S. 586) that a carriage of an entire shipload for a single shipper is "private" carriage and not common carriage, and hence not governed by the Harter Act. The following cases, of the many available, illustrate the rule:

The Blue Crest, 1937 A. M. C. 719 (2 CCA), concerning a barge load of coke towed coastwise;

The Ettore, 1933 A. M. C. 323 (2 CCA), concerning a shipload of cork from Lisbon for Philadelphia, with port of refuge expenses claimed by the ship against the cargo;

The Westmoreland, 1936 A. M. C. 1680 (2 CCA), concerning a barge load of chemicals towed coastwise;

The test of the "private carriage" doctrine appeared to be whether the cargo was shipped by a single shipper, or by two or more. If there was but one shipper, he and the carrier could contract as they pleased, regardless of the prohibitions of Sections 1 and 2 of the Harter Act. These Sections do not say anything about charters or charterers; they do not prohibit the makers of a charter party from contracting as they please about negligence.

The situation of a bill of lading issued when the vessel was under charter depended on many facts, and was confusing. Most of the litigated cases were suits between the ship and its charterer. The *Ettore* was a suit by the ship against bill of lading cargo for General Average; the charterparty stipulated the York-Antwerp Rules of 1890 but the master signed bills of lading stipulating the Rules of 1924 and the court held that the ship was bound by the charter and the 1890 Rules. *The Ferncliff*, 1938 A. M. C. 223 (D. Md.), affirmed without opinion, 1939 A. M. C. 1420 (4 CCA), was a suit by *bona fide* purchasers for value of negotiable bills of lading issued by the master of a chartered ship to the charterers, for damage to cargo shipped from Japan to Baltimore. The bills of lading had no Harter Act clause; but the charter (whose terms were unknown to the bill of lading consignees) contained a Harter Act clause. Judge Chesnut held that the bill of lading holders were entitled to rely on Harter Act conditions, saying; "Much of the shipping of the world is done on the faith of bills of lading under c. i. f. contracts. It is highly essential to this form of commerce that the purchasers of goods shall be entitled to rely on clean bills of lading free from equities in favor of the ship as against a charterer, in the absence of notice to the contrary." (P. 222). He therefore held that the ship was not exempted by the charter party agreement from liability for damage caused by negligent stowage actually performed by the charterer, as was expressly stipulated in the charter party.

The case thus presented a sharp conflict between two well-settled

rules of policy and the emerging rules as to c. i. f. contracts. On the one hand, it has been well settled that there is freedom of contract in respect of charter parties. Two men willing to lease a ship may make any contract they please as to where liability for any loss shall fall. It has also been firmly settled that the master of the vessel has no authority whatever to change or modify the charter party contract by means of a bill of lading. The *Ferncliff* holds that both of these rules must yield to the public commercial interest in the effectiveness of a negotiable bill of lading as part of the system of c. i. f. financing of the movement of goods, whenever the master varies the charterparty by signing a negotiable bill of lading which passes into the hands of a *bona fide* purchaser.

Compared with this statement of the Harter Act law, the act of 1936 does not differ so greatly as had been thought. The Act of 1936 applies to *every* bill of lading and to every "similar document of title" in so far as it relates to "carriage of goods by sea," Section 1 (b). It does not apply to charter parties, which are not "documents of title to goods," but leases or contracts for the services of ships. Nor does it apply to mere receipts for cargo carried under a charter party. It is firmly established that a receipt, although in the form of a bill of lading (straight or negotiable) is still merely a receipt as between the ship and the charterer, *The Gonzenheim*, 1930 A. M. C. 122 (5 CCA); it is also still merely a receipt between the charterer and the shipper of the cargo if the shipper has knowledge of the charter party. Hence it is thought that an unnegotiated bill of lading which is merely a receipt for goods under a charter party is not governed by the 1936 Act, unless and until it is negotiated under such circumstances that it becomes the contract of carriage, or, as the Act expresses it in Section 1 (b), "from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and the holder of the same."

The doctrine of "private carriage" must hereafter be restricted to carriage under charter party with an unnegotiated bill of lading; or to the non-commercial transactions mentioned in Section 6. This points to the use of a "straight" bill of lading, which cannot be negotiated. (Pomerene Act, sections 2 and 3). In ordinary times, that is a serious handicap to trade; but in war times the necessities of blockade controls restrict the use of freely negotiable bills of lading in many trades anyway.

Charterer's Signature. Bills of lading issued by a charterer on its own forms and signed by the charterer's agent "for the Master" in accordance with the Master's written authority bind the vessel, the shipowner, and the charterer: *The Quarrington Court,* 1940 A. M. C. 1546, at 1554; (S. D. N. Y.).

The same case held that when the charterparty incorporates the Carriage of Goods by Sea Act, the shipowner's obligation to the charterer with respect to claims based on cargo shipments is the same as that owed to holders of bills of lading governed by the Act; and, the court added, "it still allowed some scope to the warranty of seaworthiness contained in the charterparty." P. 1556.

Required Contents of the Bill of Lading—Clause Paramount.

Section 13 requires that "every bill of lading * * * which is evidence of a contract for the carriage of goods by sea *from ports of the United States,* in foreign trade, shall contain a statement that it shall have effect subject to the provisions of" the Carriage of Goods by Sea Act, 1936. The Canadian Act in Section 1, the Newfoundland Act in Section 3, and the British Act in Article 1, make the same requirement in respect of bills of lading issued in those countries. The language was interpreted by the Supreme Court of Nova Scotia to be imperative, so that the bill of lading, lacking the required Clause Paramount, would be illegal and wholly ineffective between the consignor and the ship, *The Hurry On* (*Vita Products Inc.* vs. *Unus Shipping Co., Ltd.*), 1938 A. M. C. 129, (1938) 2 Dominion L. R. 372, 383; but this view was disapproved and the case was, to this extent, reversed upon appeal to the Privy Council, which held that the requirement of a Clause Paramount is merely directory and not imperative. 1939 A. M. C. 257, (1939) A. C. 277, 63 Ll. L. R. 21, 55 T. L. R. 402. The case has been discussed at page 119, *supra.*

The Palestine Ordinance, enacted by a British Order in Council, requires more cannily that every bill of lading *shall be deemed* to have effect subject to the Rules.* *

It may happen that two clauses paramount are endorsed on the same bill of lading. See *The Steel Inventor,* 1941 A. M. C. 169 (D. Md.). If one of them refers to the *lex fori,* the court will apply that one. If both should refer to foreign laws, the court would presumably apply the one which referred to the place of shipment.

* * *The Torni,* [1932] P. 27, 78; 41 Ll. L. R. 174, 43 Ll. L. R. 78; 48 T. L. R. 195, 471.

Congress has not provided any penalty for a failure, on the part of a shipper, carrier, or agent, to insert the clause paramount in a bill of lading. It is therefore suggested that a violation of this section may be unpenalized, and that the courts will, in any case, construe the bill of lading as though it contained the clause paramount, inasmuch as the introductory section of the Act expressly declares "that every bill of lading * * * which is evidence of a contract for the carriage of goods by sea *to or from ports of the United States,* in foreign trade, shall have effect subject to the provisions of this Act." The courts may imply a clause paramount in an incoming bill of lading.† There is no difficulty in implying the same clause paramount in an outward bill of lading. *Shackman* vs. *Cunard,* 1940 A. M. C. 971 (S. D. N. Y.).

An alternative would be to hold the carrier bound by the "Responsibilities and Liabilities," and deny him the benefit of the "Rights and Immunities"; this would assume that attempts to evade the Act will always emanate from the carriers against the wishes of the shippers of goods.

It may be remarked that Messrs. Temperley & Vaughan have expressed the view that under the English laws, a failure to insert the clause paramount in any bill of lading may be a misdemeanor, punishable by fine and imprisonment. This is apparently not the law under the federal system of justice in the United States.

A suitable clause paramount for American trades reads as follows:

> "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

Leading Marks—Quantity, Weight, Etc.

The bill of lading must show the leading marks. A carrier may properly add special agreements as to the size, color, etc. of the marks.

The carrier must state *either* the number of pieces, packages, *or* the quantity, *or* the weight of the cargo received; he is not compelled to

† Knott *vs.* Botany Worsted Mills, 1898, 179 U. S. 69, at 74.

state more than one. The carrier is not bound to know the trade significance of the grade marks. *Buenos Aires* (SDNY), 1931 A. M. C. 649.

Bulk Cargo.

Weights Ascertained by Third Parties. The bulk cargo provision, Section 11, is word for word the same as the bulk cargo clause of the British Act, Section 5, and the Canadian Act, Section 6. The clause was devised to meet the special needs of the coal trade; it is also useful in the grain trade, in some ore trades, and to some extent in the bulk oil trades. While this section plainly modifies the provision of Section 3 (3) which states what the bill of lading shall contain in the way of description of the goods, and Section 3 (4) and (5) as to the effect of the bill of lading as a receipt for the cargo, there has been no recent criticism of the bulk cargo clause,* and no dissatisfaction with its operation. Section 11 must be read in connection with Section 21 of the Pomerene Act; it will be noted that the Pomerene Act does not provide for loading and counting of cargo by third parties, but limits its language to loading and counting by either the carrier or by the shipper. In the ocean carrying trades, bulk cargoes are often loaded by railways and grain elevator companies, which are neither carrier nor shipper. The bulk cargo clause would seem to be a perfectly proper added provision to cover such situations, to which the Rules really do not apply. It must always be remembered that the Rules are not a complete code of bill of lading law, but represent an agreement for the unification of *certain* rules; additional clauses, not contrary to the rules which have been standardized, may therefore be devised at any time, either by a legislative body or by commercial interests.

Non-Binding Statements of Value, Quantity and Quality.

While the Act says that the bill of lading need state only the number of packages *or* the quantity *or* the weight of the cargo, it is often desirable or necessary to state all of these facts and also statements of invoice values, for purposes of export permits, customs-house entries, etc. Such additional statements, if clearly indicated as such, would seem to be non-binding on the carrier and not guaranteed by the shipper to the carrier. Similar statements are currently required for war and blockade purposes. See *War and Blockade, post.*

* There was criticism in 1922 by the American meat packers, although they do not usually ship bulk cargoes: See *Hague Rules* vs. *Harter Act?—Arguments in Opposition* (to the Hague Rules), prepared by the Institute of American Meat Packers, May 1, 1922, p. 16, bottom.

Order and Condition of Goods.

The bill of lading must state the apparent condition of the goods. Section 3, sub-section 3(c). This appears to overthrow the rule of the *Isla de Panay,* 267 U. S. 260, 1925 A. M. C. 447, that a bill of lading containing no statement at all as to the condition of the goods is not a representation of their good order and condition. See also *Goyaz* (2CCA), 1924 A. M. C. 1469, 3 F.(2d) 553; *West Campgaw* (D. Mass), 1937 A. M. C. 427.

But it should be noted that a mere statement that the merchandise is in apparent good order and condition does not relieve the cargo-plaintiff of his initial burden of proving its true condition at the time of shipment, as a condition precedent to maintaining any cause of action for cargo damage. *Niel Maersk* (2CCA), 1937 A. M. C. 975, 91 F.(2d) 932, certiorari denied, 1937 A. M. C. 1646; *Glasgow Maru* (SDNY), 1937 A. M. C. 625; *Albers Bros. Milling Co.* vs. *Hauptman,* 1938 A. M. C. 752, 95 F.(2d) 286 (9CCA). It is instructive to compare the *Niel Maersk case* with the *Vallescura* decision, 293 U. S. 296, 1934 A. M. C. 1573. In each instance cargo was damaged by two different causes, and the effects of these causes could not be separated. In the *Niel Maersk case,* the cargo (fish meal) was perhaps not in good order when shipped, and suffered further damage on the ship; the cargo owner could not or would not prove the true condition at the time of shipment, and the court refused to hear his case. In the *Vallescura* the cargo (onions) was damaged partly by negligent failure to ventilate in good weather, and partly by inability to ventilate in bad weather; the shipper proved good order upon shipment and the ship was held liable for all the damage.

The *Carso* (2CCA), 1931 A. M. C. 1497, discusses the effect of an untrue statement of the condition of the merchandise; a clean bill of lading was given for cheese actually in rotten condition. One lot of cases appeared sound, another lot had cases visibly broken and a third lot had cases visibly stained by contents. The plaintiff accepted drafts in reliance upon the clean bills of lading. The vessel was held liable for the loss on the third lot only, the shipowner being estopped to deny the clean receipts issued for cases visibly stained by contents.

The carrier's right to investigate the previous history of the cargo and to force the production of testimony concerning it has been a source of sharp controversy. If the carrier has such a right and the cargo owner obstructs it, the natural inference would be that the evidence, if produced, would be unfavorable to the cargo.

The ship is by no means irrevocably bound by the form of receipt. *Monnier* vs. *U. S.*, 1925 A. M. C. 982, 16 F.(2d) 813 (E. D. N. Y.), affd. without opinion, 16 F.(2d) 815 (2CCA).

Forbidden Clauses—Benefit of Insurance Clauses.

Section 3 (8), second paragraph, declares that "benefit of insurance" clauses are null and void. The elaborate and artificial system of "loan receipts" resulting from the situation disclosed in *Luckenbach* vs. *McCahan Sugar Refining Company* * and the *Turret Crown* may therefore now be discarded. The prohibition of "benefit of insurance" clauses cannot be supposed to extend to "insured" bills of lading, such as were considered by the Supreme Court in the *Dixon—King*, 301 U. S. 646, 1937 A. M. C. 697, at 703. An "insured" bill of lading does not relieve the carrier from liability; quite to the contrary, it imposes on him a liability commensurate with that of an insurer, which liability he undertakes to insure.

Seaworthiness, Due Diligence, Sea Peril, Act of God, Latent Defect.

The Convention and the Acts have frankly adopted the Harter Act idea that "due diligence" is the utmost that can be required of the shipowner and the carrier, and that losses which occur in spite of "due diligence" shall be borne by the cargo interests. The Harter Act formula is thus now the general expression of the distinction long referred to on the Continent as that between "fautes nautiques" and "fautes commerciales," and the many American decisions on due diligence are valuable precedents. What is "due diligence?" The courts have refused to state a definite formula, and judge each case on its facts, keeping the shipowners in the dark until the event is known. This attitude undoubtedly stimulates the ship owners strongly to err in the direction of being over-diligent. If the ship and cargo arrive safely, obviously there has been adequate diligence, or good luck. If the ship is lost, or arrives with a damage, the question is

* *Luckenbach* vs. *McCahan*, 1918, 248 U. S. 139; *Turret Crown*, 1924 A. M. C. 253, 297 Fed. 766, certiorari denied, 264 U. S. 591. Cf. 38 Harv. L. R. 117.

whether the loss was due to lack of due diligence to make seaworthy, etc., or to a sea peril, Act of God or latent defect, operating in spite of the exercise of due diligence.

The general statement in the *Silvia* (1898), 171 U. S. 462, 464, that a ship must be "reasonably fit to carry the cargo which she has undertaken to transport," considering the season and the waters to be crossed, remains the basis of the extensive gloss developed by the cases.

In *The Rosalia*, Judge HOUGH said, rather picturesquely, that a peril of the sea "means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port safely" (2CCA) (1920), 264 Fed. 285. This phrase has been quoted on countless occasions. Concerning it, Judge CHASE later said: "With this we are quite in accord. This statement, however, did not add to nor detract from what had previously been a peril of the sea. One's conception of what is catastrophic may differ from that of another; but the words *so catastrophic* could of course be replaced by colorless words like *of such a character*—without changing the legal import at all. The law was left as stated in the *Warren Adams* (2CCA), per WALLACE, Ct. J. (1896), 74 Fed. 413, 415; and the *Giulia* (2CCA), per RODGERS, Ct. J. (1914), 218 Fed. 744, 746, which were cited. In the *Warren Adams*, the definition is: *all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must occur.* The definition found in the *Giulia* is: *perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertion of human skill and prudence.* A multiplication of definitions will result only in a multiplication of words without serving any useful purpose. The difficult task is not to define in general terms a peril of the sea, but to determine whether some established facts and circumstances fall within a sound definition. These opinions may be at variance and give to close cases little value as precedents. Yet this situation obtains largely throughout the whole administration of justice, because it is impossible to do away entirely with the human element in applying the law to the facts." He then proceeded to find that the vessel had been made seaworthy with due

diligence before leaving Colombo for New York, and that the entry of seawater into a hold was due to hurricane weather in the North Atlantic in the month of January. *Makalla* (*Duche & Sons* vs. *Brocklebank and Cunard*) (2CCA), 1930 A. M. C. 717, at 718, 40 F.(2d) 418.

Of *The Rosalia*, Judge Learned HAND has said: "The phrase perils of the sea has at times been treated as though its meaning were esoteric; Judge HOUGH's vivid language in *The Rosalia* has perhaps given currency to the notion. That meant nothing more, however, than that the weather must be too much for a well-found vessel to withstand. The standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance the precautions in hull and gear which will be necessary to meet the manifold dangers of the sea. That Judge HOUGH meant no more than this in *The Rosalia* is shown by his reference to the definition in *The Warren Adams* as the equivalent of what he said. * * *. It would be too much to hope that *The Rosalia* will not continue to be cited for more than this; but it would be gratifying if it were not." *The Naples Maru*, 1939 A. M. C. 1087, at 1090-91 (2CCA).

The case of *Poleric* was that a cargo steamer, completely reconditioned after hard war service, suffered a series of boiler breakdowns on a round-the-world voyage, due to loss of steam through leaks developing in the main reciprocating engine; it turned out that there was a fundamental mis-alignment of the parts of the main engine which surveyors and repairmen at various ports failed to detect. Finally there was a breakdown in mid-Atlantic, followed by long delay at an Azores port of refuge, during which period the cargo of jute took fire from natural causes. The vessel was held to have been unseaworthy when leaving Calcutta, where the jute was loaded. The anticipated defense of the "fire statutes" failed because the bill of lading, through an obvious oversight in draftsmanship, did not refer to the British and American "fire statutes," but on the contrary merely contained an exception of fire provided the vessel should be seaworthy on sailing, which waived the statutory defense under the facts of the case. *Bank Line* vs. *Porter*, EDVa., 1927 A. M. C. 346, affirmed (4CCA), 1928 A. M. C. 761; certiorari denied.

In *Singleton Abbey*, a foreign vessel overhauled in Rotterdam made a round voyage to Haiti, and on the return passage to Antwerp filled up the forepeak tank, which had previously been empty; a rivet was

then missing from the bulkhead, so that water ran into the forward hold and damaged the coffee cargo. The bill of lading stated an exception against "unseaworthiness, provided all reasonable means have been taken to provide against such unseaworthiness," but did not add *prior to commencing the voyage*. The court in the absence of proof of any foreign law applicable to this foreign voyage, applied the American doctrine of *Caledonia* (1894), 157 U. S. 124, and *Carib Prince* (1897), 170 U. S. 655, and held the foreign vessel unseaworthy and liable, saying that there is no difference between exceptions against defects in hull and gear and those against unseaworthiness as such. (2CCA), 1932 A. M. C. 773, certiorari denied.

A vessel seaworthy by the usual standards when built, and maintained in that same condition, may in time become unseaworthy merely due to the advance in standards of construction. In the case of the *Manchuria*, the vessel's chain locker was located abaft the collision bulkhead, and was not separated from the forward hold by a watertight bulkhead extending to the deck, which was usual and proper practice at the time the ship was built in 1904. In 1920 and 1925 the classification regulations were altered to require a watertight bulkhead, but the bulkhead of this ship was not altered. In 1925 the ship encountered a hurricane, which was a sea peril, and water entered the chain locker, overflowed and reached the cargo. No such damage had occurred during the vessel's 23 years of service. The court held the owners liable *in personam*, saying: "The owners neglected the precautions thus indicated as reasonable, and an injury resulted from the anticipated source of trouble. Under these circumstances we cannot say that they met the burden of proving due diligence in making the vessel seaworthy." *Atlantic Transport Co. and I. M. M. Co.* vs. *Rosenberg Bros. & Co.* (9CCA), 1929 A. M. C. 1539.

The search for latent defects does not require the ship's equipment to be tested to the point of destruction; in the *Floridian case*, where the steering chains broke on a vessel recently recommissioned after prolonged lay-up, the Circuit Court of Appeals said, in reversing the trial court: "It appears that the chains were not only tested for cracks with a hammer, but that an actual test of the whole gear was made at the dock. * * * This put a good strain on the chain and seems to be the most thorough test possible aside from actual use in very bad weather. To require that would be to read the 'due diligence' clause out of the bill of lading. * * * If competent men con-

sidered the vessel seaworthy, after an inspection, with full knowledge of repairs made, it indicated that due diligence had been used for the expectable strains and tests of her voyage, and the vessel owner was justified in believing her fit for the voyage," per MANTON, Ct. J. (2CCA), 1936 A. M. C. 1006; 83 F.(2d) 949, certiorari denied, 1936 A. M. C. 1666.

The *Denali* was a case of stranding while the Alaska pilot was standing a watch in excess of the number permitted by the Three-Watch statute; the watch officers were not divided into three equal watches on the ship and an excess number of hours was assigned to the pilot. The court laid down the rule that when a statutory rule is violated, resulting in cargo loss, the carrier may not have the benefit of the lawful exceptions (in this case, errors of navigation) unless it shows (in the language of *The Pennsylvania*, 86 U. S. 125 at 136) that the violation not only did not, but could not have contributed to the loss. 1939 A. M. C. 930, affirmed after re-argument, 1940 A. M. C. 877 (9CCA), certiorari denied, 1940 A. M. C. 1520.

Recent cases discussing various aspects of the matter have been:

The San Vincente and *The Bruce*, 1938 A. M. C. 232 (2CCA) in respect of adequacy of charts;

The J. Edwin Kerwin, 1938 A. M. C. 1202 (5CCA), relating to general unseaworthiness of a wooden schooner which leaked and foundered in ordinary weather;

The Liberator, 1938 A. M. C. 141 (E. D. N. Y.), where a screwplug rivet, intended for draining bilges on drydock, corroded and fell out;

The Toledo, 1939 A. M. C. 1167 (E. D. N. Y.), broken crankshaft due to latent defect not discoverable with due diligence;

The San Diego, 1939 A. M. C. 1167 (9CCA), deck cargo lost when vessel rolled to unusual degree;

The Aakre, 1940 A. M. C. 154 (S. D. N. Y.), error in taking a radio bearing;

The Sargent, 1940 A. M. C. 670 (E. D. Mich.), waterpipe in grain cargo hold broken by frost;

The Quadrington Court, 1940 A. M. C. 1546 (S. D. N. Y.), main injection pipe split, due to latent defect in braze, aggravated by dezincification;

The Maui, 1940 A. M. C. 1299 (9CCA), under the Harter Act, perishable cargo spoiled due to delay caused by strike of the crew;

The Iowa, 1941 A. M. C. 111 (D. Ore.), under Harter Act conditions, vessel lost on Columbia River Bar in a storm; the case is described at page 125-6;

The Ruth C., 1941 A. M. C. 376 (Wash. State Sup. Ct.), under Harter Act conditions, vessel lost after striking a floating log; the case is described at page 126.

The older authorities have been collected in LORD & SPRAGUE'S volume of *Cases on Admiralty*; by CARVER on *Carriage of Goods by Sea*; and SCRUTTON on *Charter Parties*.

Seaworthiness—Overloading. The United States and Canada both adhere to the Loadline Convention (London, 1930) which prescribes formulas according to which the depth of loading of vessels are regulated, and fixes zones and seasons for loading to the various prescribed lines, and corresponding statutes have been enacted. U. S. Act of March 2, 1929, 45 U. S. Stat. L. 1492. The Convention is at 47 U. S. Stat. L. 2228. The Canadian provisions are found in Sections 422-443 and in the Fifth Schedule of the Canada Shipping Act of 1934.

If an overloaded vessel gets into difficulties because of her overloading, it has been said that the fact of overloading is decisive as to her unseaworthiness. *Indien* (9CCA), 1934 A. M. C. 1050, 71 F.(2d) 752; but merely sailing along or straying across the boundary of one of the loadline zones does not impose liability for cargo damage which is not causally a result of being loaded beyond the permitted point at the time and place in question. *Naples Maru* (2CCA), 1939 A. M. C. 1087. Owners were held liable for losses due to overloading before the Act and Convention came into effect. *Vestris* (SDNY), 1932 A. M. C. 863. The Act and Convention have not altered the law as to liability but have provided a method for preventing over-laden vessels from leaving port.

The Implied Warranty of Seaworthiness.

An historic doctrine of the English and American admiralty and maritime law of sea carriage was the rule invented by the judges that the carrier impliedly warrants the seaworthiness of the ship. In the absence of any statute, and the bill of lading contract being silent, the courts have read this inescapable implied warranty into every bill of lading. In England, the courts have permitted the carrier to avoid the warranty by any clear and explicit statement in the bill of

lading disclaiming any such warranty. But in the United States, the courts declined to enforce agreements disclaiming the warranty, however explicitly expressed; it has been deemed a rule of public policy that a carrier cannot be allowed to contract wholly out of the warranty. By means of the Harter Act, carriers have been allowed to reduce their liability from the absolute warranty to the duty to use due diligence; but the complete exoneration agreement, which is valid in England, has been invalid here. The Hague Rules Convention makes no mention of the implied warranty of seaworthiness, which was of no interest to any of the jurists excepting the British and the Americans, since no other countries have the implied warranty. The British, in enacting the Rules as legislation in 1924, took the precaution of expressly abolishing the implied warranty of seaworthiness; British Act, Section 5. The Canadian Act of 1936 likewise expressly abolishes the warranty; Canadian Act, Section 3. The American Act of 1936 does not mention the warranty; is it therefore still a living doctrine of the maritime law in the United States? It would seem that the doctrine has clearly been overthrown by necessary implication from the provisions of Section 3 (1), which states categorically that

> "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy * * * "

This exact statement of the carrier's duty is wholly incompatible with an implied warranty that the ship shall in fact be seaworthy, a much broader proposition than that stated in the new statute. It seems that the doctrine of implied warranty, developed through the case law of the past three-quarters of a century, may be considered as of no further effect, insofar as foreign commerce by sea is concerned. The doctrine presumably will continue to have its usual effect in respect of domestic commerce conducted under the Harter Act, and in respect of claims of seamen and passengers, and concerning charters, baggage, and all other matters not relating to cargo carried underdeck under the terms of the 1936 Act.

Burden of Proof.

An important change which the Act makes in the pre-existing law relates to the burden of proof of negligence in case a suit is brought against a carrier. In an early case antedating the Harter Act, and which dealt with the carriage of goods by sea, the United States

Supreme Court, speaking through Mr. Justice Nelson, said: "The question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents (the carrier) to show that it was occasioned by one of the perils from which they were excepted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although a loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff (here the consignee) to establish the negligence, as the affirmative lies upon him." *Clark* vs. *Barnwell* (1851), 53 U. S. (12 Howard) 272.*

The rules here announced do not appear to have been altered by the Harter Act. Thus in *Warren Adams* (1896), 74 Fed. 413 (2CCA), concerning damage to sugar between a foreign port and New York, the court said, without reference to authority: "When goods in the custody of a common carrier are damaged after their reception, and before their delivery, there is a *prima facie* presumption that the injury is occasioned by the carrier's default, and the burden is upon him to prove that it arose from a cause for which he was not responsible. If it appears that the injury has been caused by the dangers of navigation, or some other cause within the exception of the bill of lading, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier."

In *Patria* (1904) 132 Fed. 971 (2CCA), which dealt with a ship-

* See *Glasgow Maru* (SDNY), 1937 A. M. C. 625 at 635; *The Niel Maersk*, 1937 A. M. C. 975, at 978, 91 F.(2d) 932 (2CCA); *Albers Bros. Milling Co.* vs. *Hauptman*, 1938 A. M. C. 752, 95 F.(2d) 286 (9CCA).

ment of beans from Marseilles to New York, the Court in restating the rule, gave some practical illustrations of the manner in which it would apply. Judge LACOMBE said: "It is, no doubt, the rule * * * that, when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libellant may show that the negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover." Thus under the pre-existing law when goods were receipted for in good condition, and delivered in a damaged condition or not delivered at all, the carrier had the burden of proving that the loss or damage arose from one of the excepted causes. But as soon as he had done this, the shipper then assumed the burden of proving that the loss or damage might have been prevented by the exercise of due care on the carrier's part. Failure to successfully bear this burden frequently resulted in the loss of meritorious claims.

The Act greatly aids the cargo interest at this point. For it is now incumbent upon the carrier to acquit himself of the onus of showing, e. g. that the weather encountered was (1) the cause of the cargo damage, and (2) that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. And unless the cause is one of the sixteen statutory exceptions (a) to (p), the carrier must affirmatively show absence of negligence, fault or privity on the part of himself and his servants.

The pre-existing law as stated in the *Warren Adams* and the *Patria* still applies in respect of the sixteen statutory exceptions (a) to (p); if the carrier can show that the loss falls within one of those exceptions, then the cargo-owner assumes the burden, as heretofore, of showing that the loss was due to negligence on the part of the carrier and his servants, and fails if he cannot adduce a preponderance of proof to that effect.

If the state of the evidence is doubtful, the carrier is excused, as the plaintiff suing for cargo damage always has the burden of overcoming the case made by the defense. *The Rosalia* (1920) 264 Fed. 285 at 288 (2CCA); *The T. N. No. 73* (*Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*), 1940 A. M. C. 1361 (2CCA), certiorari granted, 1940 A. M. C. 1672. In the latter case, the District Court found that "the cause of the accident had been left in doubt," and the C. C. A. affirmed.

There is a presumption in favor of a bailor, but this is a mere rule for the conduct of the trial, and once the bailee has met the presumption by substantial evidence, it disappears from the case. *Alpine Forwarding Co.* vs. *Penn. Railroad*, 1932 A. M. C. 1504 (2CCA).

In *The Aakre*, 1940 A. M. C. 154 (S. D. N. Y.), it was held that a Canadian clause paramount nullified a bill of lading clause which might have waived the carrier's right to insist that the cargo should support the initial burden of proof; the requirements of the Act were imperative.

Scope of the Shipowner's or Carrier's Statutory Exceptions.

On what theory are the exceptions enumerated in Section 4 (2) (a) to (p) to be understood as exempting the carrier from liability for the results of the negligence of himself and his servants?

Messrs. James S. Henderson and Sanford D. Cole the editors of the 7th edition of CARVER'S *Carriage by Sea*,* and Messrs. TEMPERLEY & VAUGHAN † have disagreed as to this. Inasmuch as the Act makes no distinction between a common and a private carrier, the editors of CARVER have considered that the Act deals with all carriers as bailees who are not common carriers and hence protected against the result of their own or their servant's negligence, except where the contrary is expressly indicated. VAUGHAN, however, concludes that the Act has not changed the law of common carriers, and that the Act leaves the carrier liable for negligence of himself or his servants, causing or contributing to the loss, except where the negligence of the servants is expressly excepted, as in exception (a)—errors of navigation or management—or where there is an express reference to the "cause" of the damage, as in exception (b)—fire—and (j)—strikes and lockouts. It would seem that every one of the exceptions (a) to (p) inclusive falls within one or the other of these categories. Hence under either view, exceptions (a) to (p) always operate to exonerate or exempt the carrier from liability.

* (1934) Section 77, p. 112.

† *The Carriage of Goods by Sea Act, 1924*, 4th Edition, 1932, pp. 44-49.

Exception Clauses Regulated by the Act—Errors of Navigation and Management.

The Hague Rules, both the Convention and the Acts, have plainly adopted the American jurisprudence as to the nature of acts of navigation and management of the ship, and the shipowner's and carrier's exoneration from liability for errors of navigation and management. *The Fred W. Sargent,* 1940 A. M. C. 670, at 675 (E. D. Mich.). The entire body of case-law built up in the interpretation of this phrase under the Harter Act would seem to be equally applicable to the 1936 Act. The cases have been collected on various occasions; but as the views of the courts expressed in connection with each fresh situation presented for adjudication are continually changing, a fresh summary of American cases is here attempted.

The line between error in navigation and management of the ship and fault in care and custody of the cargo is not a hard and fast one; the court will consider all the circumstances of each situation. If there is doubt, it is usually resolved against the ship. *Vallescura,* 293 U. S. 296, 1934 A. M. C. 1573; *Ogla S.* (5CCA), 1928 A. M. C. 831; *Aquitania* (EDNY), 1929 A. M. C. 1557; *Carnia* (EDNY), 1933 A. M. C. 1397. The following examples illustrate where the border lines now appear to be.

Open Port-holes, Manholes, etc. If a port-hole is open, and is located in a place where it can readily be reached to shut it, and the person in charge is aware that it is open and may have to be shut if a storm should arise, then a careless failure to shut it is an error in management. *Silvia* (1898), 171 U. S. 462. But if it is open or leaky at the time of sailing, and located in an inaccessible place, and the person in charge believes it to be shut and tight, then the ship is unseaworthy and due diligence has not been used, and the vessel is liable for negligence in care and custody of the cargo. *Steel Navigator* (2CCA), 1928 A. M. C. 388; *Campbell's Soup Co.* vs. *Federal M. S. Co.* (SDNY), 1935 A. M. C. 634; *Mauretania* (2CCA), 1936 A. M. C. 1130; *Vestris* (SDNY), 1932 A. M. C. 863, at 878 ff. In *Elkton* (2CCA), 1931 A. M. C. 1040, 49 F.(2d) 700, an engineer had opened a double-bottom manhole cover in order to prepare the tank for a liquid cargo (which was later cancelled) and left the cover off in order to permit the cement wash to dry thoroughly. When the loading of the liquid cargo was cancelled, he forgot to put back the cover before dry cargo was placed on top. The engineers knew the cover was off, and that they should refrain from filling that tank during the voyage, but later on forgot this, and filled the tank with ballast water which overflowed into the cargo. Judge Learned Hand in affirming a decree for the cargo, said:

"It is argued that the error is still only one of management, provided, of course, that if properly handled she can be made to serve her purposes * * * (that) she will be seaworthy if the crew prove duly attentive." This argument he rejected, saying: "When the owner accepts cargo in an unseaworthy ship, though the defect may be neutralized by care, he imposes upon the shipper an added risk; not merely that his servants may fail, in so far as she is sound and firm, but that they may neglect those added precautions which her condition demands. That risk the statute (the Harter Act) does not impose upon the shipper."

A similar case was the *President Polk* (2CCA), 1930 A. M. C. 1358.

In the *Samaria,* litigated under the Hague Rules of 1921 and the Harter Act in New York, a ventilator lid was negligently left open while a hose was in use to press up a ballast tank; the hose burst, and water reached the cargo through the open lid; this was held to be negligent care of the cargo, and not excusable as an error in management of the ship. *Lockett & Co.* vs. *Cunard,* 1927 A. M. C. 1057; 28 Lloyds List L. R. 181 (EDNY).

Bad stowage is not an error in management of the ship: *Knott* vs. *Botany Worsted Mills* (1898), 179 U. S. 69 (drainage from one lot of cargo damaged another); *Lady Drake* (Sup. Ct., Canada), 1937 A. M. C. 290 (barrels of molasses came adrift in heavy weather); *Breedijk* (D. Md.), 1928 A. M. C. 276, 22 F.(2d) 328 (sesame oil in second-hand barrels, stowed bilge and cantline, bilge free; vessel not liable for 3% leakage). The requirements of stowage frequently depend upon the manner in which the proferred cargo is packed. Many cargoes are offered in wrappings which are not sufficient to protect the contents; many bundles and bales are loosely tied. The value of the articles would not warrant more expensive or adequate packing. The ocean carrier is not responsible for these economic conditions, nor called upon to re-bale or to box goods beyond what the custom of the trade or the ultimate marketable values will warrant. On the other hand, the carrier is bound to take such care of the cargoes entrusted to his care as will ensure their safe and right delivery. A carrier who

accepts an unboxed motor car is bound to give it such stowage as will ensure its safe carriage and delivery without scratches. *The Southern Cross,* 1940 A. M. C. 59 (S. D. N. Y.) A dilemma is thus produced in trades where the cheapness of the customary packing and the low values and freight rates make is uneconomic for either shipper or carrier to spend the money needed to prevent damage during transit. This situation has existed in the trade in crude rubber in bales from Singapore to the U. S.; the bales, it was said, often turned out crushed and mis-shapen, affecting their marketability and increasing the cost of further processing by machinery. Of this, the Court has said: "These two doctrines clash, if each is applied with unsparing logic. On the one hand, there are very few goods, cased or not cased, that some degree of care will not protect from the perils of a sea voyage; and on the other, there are few that cannot be packed or cased so that they will survive the roughest handling. * * * In the carriage of goods the trade must always come to some accomodation between ideal perfection of stowage and entire disregard of the safety of the goods. * * * Such standards go into the contract; ordinarily they are the sole measure of the ship's liability. * * * The shippers must prove that the standard was unreasonable." And in the matter of rubber bales, the court concluded that the demands of the goods owners were themselves unreasonable "and that the damages arise from insufficiently covering plastic goods which cannot conveniently be stowed in any other way than as the trade stows them." *The Silversandal,* 1940 A. M. C. 731, at 734 (2CCA).

Insufficient dunnage is not excused; a recent discussion of the problem is the *Hokkai Maru* (S. D. N. Y.), 1936 A. M. C. 1609. Stowage of fishmeal has been extensively litigated: *The Wellman Cases*: (*The Nichiyo Maru*) 1936 A. M. C. 639 (D. Md.), 1937 A. M. C. 642 (4CCA); *The Willfaro* and *Willsolo,* 1925 A. M. C. 998 (N. D. Cal.); *The Niel Maersk,* 1936 A. M. C. 1434 (S. D. N. Y.); *The Ferncliff,* 1938 A. M. C. 206 (D. Md.). So has stowage of Philippine sugar: *The Naples Maru,* 1939 A. M. C. 1087 (2CCA); *The Glasgow Maru,* 1939 A. M. C. 281, 795 (2CCA). The stowage of rice is an ancient problem; a recent case is *The Segundo* (*Canada Rice Mills* vs. *Union Marine & General Ins. Co.*), 1939 A. M. C. 427 (Brit. Col. Ct. Ap.) reversed by the Privy Council, [1940] A. C. ——, 67 Lloyds L. R. 549, 553. These discussions are inevitably associated with the matter of inherent vice.

Covering hatches relates to care of cargo. *Jeanie* (9CCA) (1916), 236 Fed. 463; *Gosse-Millerd* vs. *Canadian Govt. Merchant Marine* (1927), 2 K B 432; (1928) 1 K B 717; (1929) A. C. 223; 32 Lloyds L. R. 91; 17 Asp. M. C. 385, 549.

Management of Ventilators at sea pertains to care and custody of the cargo; and errors in turning, opening and closing the ventilators and in covering and uncovering the hatch covers are not excusable as errors of management of the ship. *Jeanie* (9CCA) (1916), 236 Fed. 463; *Skipton Castle* (9CCA) (1917), 243 Fed. 523; *Andean Trading Co.* vs. *Pacific S. N. Co.* (2CCA) (1920), 263 Fed 559; *Edith* (2CCA), 1926 A. M. C. 281; *Vallescura,* 293 U. S. 296, 1934 A. M. C. 1573; *contra, Pacific Fir* (2CCA) (per Learned Hand, Ct. J.), 1932 A. M. C. 738, 57 F.(2d) 965. But damage due to inability to ventilate in bad weather is excused, if the vessel's ventilation equipment was of the normal and customary sort. *Naples Maru* (SDNY), 1937 A. M. C. 1238; *Clark* vs. *Barnwell* (1851), 53 U. S. 272; *La Drome* (SDNY), 1923 A. M. C. 825, 43 F.(2d) 241; *Tergestea* (SDNY), 1931 A. M. C. 1904, 54 F.(2d) 809. It should be noted that *The Naples Maru,* 1937 A. M. C. 1238 (SDNY), previously here cited, was reversed on this point; 1939 A. M. C. 1087 (2CCA).

Failure to heat or cool the cargo as agreed is error in custody and care of cargo, and is not excused unless there is supervening sea peril. *Massasoit* (heating creosote) (DNJ), 1928 A. M. C. 1458; *New York* (cooling pears) (2CCA), 1929 A. M. C. 53; *Samland* (SDNY), 1925 A. M. C. 1198, 7 F.(2d) 155, (endives, grapes); *Cox* vs. *Farley,* 1940 A. M. C. 1304 (SDNY) (asparagus). In *The Heranger,* 1939 A. M. C. 369 (9CCA), a banana case, the vessel was found to have complied substantially with the contract requirements, and the loss attributed to improper condition of the fruit before loading. The standard bill of lading disclaims all responsibility for special heating or cooling unless contracted for. Nevertheless there may be liability for discharging delicate cargoes in freezing weather. *The Champlain* (wines) 1939 A. M. C. 9 (SDNY); *The Munargo* (tomatoes) 1929 A. M. C. 1323 (N. Y. City Ct.).

Trimming a newly laden ship in a river by means of ballast tanks, prior to reaching the bar (which she failed to cross safely) was held to be excusable as an act of management of the ship in the *Horaisan Maru,* (2CCA), 1935 A. M. C. 96.

Sounding bilges and pumping bilges are regarded as essential acts of daily management of any ship, whether laden or in ballast; hence errors and negligence in sounding and pumping out bilges are deemed errors in management and are excused. *Merida* (2CCA, 1901), 107 Fed. 146; *British King* (SDNY, 1898), 89 Fed. 872; aff'd. 92 Fed. 1018; *Ontario* (SDNY, 1900), 106 Fed. 324; aff'd. 115 Fed. 769; *Sandfield* (SDNY, 1897), 79 Fed. 371; aff'd. 92 Fed. 663; *Hudson* (SDNY, 1909), 172 Fed. 1005. But dirty, clogged scuppers, permitting accumulations of natural sweat to reach and damage cargo, are not excusable as errors of management of the ship. *Cornelia* (SDNY), 1926 A. M. C. 1337; *Mursa* (ND Cal.), 1925 A. M. C. 1541. As in the port-hole cases, the failure of the seaman to be aware that the cap of a sounding-pipe is being worked loose by deck cargo in stormy weather may impose liability on the ship for resulting cargo damage. *Indien* (9CCA), 1934 A. M. C. 1050. But his mere failure to replace the cap after sounding the bilges is an error of management of the ship, and is excused. *Point Chico,* 1940 A. M. C. 639 (SDTex), a Harter Act case.

Mismanagement of cocks and valves in the engine-room is usually error in management of the ship. *American Sugar Refining Co.* vs. *Rickinson* (SDNY, 1903), 120 Fed. 591, affirmed (2CCA), 124 Fed. 188; *Wildcroft* 1906, 201 U. S. 378; *Sun Co.* vs. *Healy* (2CCA, 1908), 163 Fed. 48; *Rudolph Albrecht* (Arbitration at New York), 1931 A. M. C. 135; *Fred W. Sargent,* 1940 A. M. C. 670 (EDMich). The carrier has the burden of proof that the mismanagement was actually connected with the management of the ship; if it might have related to care and custody of cargo, the vessel is not excused. *Mary Luckenbach,* 1940 A. M. C. 1582 (Arb.). In *The Newport,* an engineer who intended to turn a valve to admit steam to the windlass in order to haul in the mooring lines which were about to be cast off for the purpose of commencing the voyage, made an error and turned steam into the cargo through the fire smothering lines. The court held that the error was not excused by the Harter Act, because the voyage had not commenced. *Newport* (9CCA), 1925 A. M. C. 1193. It would seem that although this error will be excusable under the Carriage of Goods by Sea Act, because that Act begins to apply as soon as the cargo is loaded, yet the ship will have to pay nevertheless, because the requirement of Section 3(1) (c) that the holds shall be made safe speaks as of the entire time prior to commencing the voyage and the hold with steam in it was obviously unfit for cargo prior to

sailing. The facts of *The Sargent,* 1940 A. M. C. 670 (EDMich), were that an unprotected water service pipe froze and split; when it thawed, water dripped on grain cargo. The freezing exposure was partly while loading and partly after sailing, but the risk of the situation existed before and during loading; indeed, the risk had existed for many years.

In the *West Imboden case,* the master erroneously thought a fire had broken out in the cargo, during a storm at sea, because the decks were warm in the vicinity of a broken steam-pipe; he accordingly turned on the smothering steam. This was held to be an error of management, and the vessel was not liable for the cargo loss and collected a general average (2CCA), 1937 A. M. C. 462.

Collision, stranding. Almost all collisions and strandings are due to negligent navigation and not to unseaworthiness existing at the time the voyage commences. *Etona* (2CCA, 1896), 71 Fed. 895; *Rosedale* (SDNY, 1898), 88 Fed. 324; *Humarock* (SDGa, 1916), 234 Fed. 716; *Spartan* (2CCA), 1931 A. M. C. 1; *The Marianne,* 1938 A. M. C. 1327 (EDLa). An example of the latter kind is an error in connecting up the steering apparatus, so that the vessel, on sailing, turns the wrong way, or fails to respond to her helm.

Error in radio bearing. An error in taking a radio bearing, resulting in a stranding, relates to navigation of the vessel and, like any other error in a navigational observation or calculation, is excused. *Aakre,* 1940 A. M. C. 154 (SDNY).

Charts, compasses, pilot-books, etc. If the owner supplies the usual equipment of charts, compasses, light-lists, and other aids to navigation, and the men on the ship who are competent to use these aids carelessly fail to use them with sufficient skill or at all, there is error of navigation and management for which ship and carrier are not liable. These issues have of late been vigorously litigated in coastwise cases under the Harter Act, in an effort to come within the *Isis* rule. *Iowa,* 1938 A. M. C. 615 (Commissioner's Report), affirmed 1941 A. M. C. 111 (DOre); *Denali,* 1938 A. M. C. 506 (WDWash), affirmed on this point but reversed on other grounds, 1939 A. M. C. 930 and 1940 A. M. C. 877 (9CCA); *San Vincente and Bruce,* 1938 A. M. C. 232 (2CCA); *Yungay* (SDNY), 1932 A. M. C. 123; *Steel Scientist* (2CCA), 1936 A. M. C. 387. In the latter case, it was urged that the owner should see to it that the current corrections are actually transcribed into the navigation books and onto the charts before the voyage commences, but the court said that such extreme precaution was

not necessary when the men on the ship had ample time to do what was necessary at sea before reaching the place where the corrected information was needed.

On the other hand, a failure to carry correct charts, and a reliance on information which is out-of-date is not excused. *Maria* (4CCA), 1937 A. M. C. 934; *Maria* (SDNY), 1936 A. M. C. 1314.

Failure to take a local pilot in the waters of Corner Brook, Newfoundland, was condemned in the Framlington Court (5CCA), 1934 A. M. C. 272; the vessel was said to be unseaworthy under a charter.

Failure to inspect hatches at a port of call, *U. S.* vs. *N. Y. & O. S. S. Co.* (2CCA) (1914), 216 Fed. 61, doubted in *Skipton Castle* (9CCA) (1917), 243 Fed. 523, and *tipping vessel by the head* to examine the propeller, *Indrani* (2CCA) (1910), 177 Fed. 914, are errors of management of the vessel.

Leaks at sea. Failure to put into a port of refuge to repair a deck which had become leaky in heavy weather is an error of navigation. *Musselcrag* (*Carsar* vs. *Spreckels*) (9CCA) (1905), 141 Fed. 260. The opposite action, putting into a port of refuge, is not condemned, even if the leaks might have been prevented by due diligence before sailing. *Malcolm Baxter, Jr.*, 1928 A. M. C. 960, 277 U. S. 323. The case of the *Milwaukee Bridge* was that there were acid drums properly placed on deck, which became leaky at sea, and the drip of acid was washed overboard with a hose; the diluted acid unexpectedly attacked the metal deck plates and caused leaks. The loss was excused as due to error of management (2CCA), 1928 A. M. C. 1063, 26 F.(2d) 327, certiorari denied, 278 U. S. 632. Carelessly poking a hole in a choked drain-pipe at sea, thus admitting water to the cargo hold, is negligent management of the ship, and is excused. *J. L. Luckenbach* (2CCA), 1933 A. M. C. 105.

Failure to make adequate repairs at a port of refuge after a stranding or other disaster is not an error of management and is not excusable. *West Cajoot* (9CCA), 1936 A. M. C. 850; *Campbell's Soup Co.* vs. *Federal M. S. Co.* (SDNY), 1935 A. M. C. 634.

Negligent stowage relates to care and custody of the cargo, and imports liability. In *Knott* vs. *Botany Worsted Mills* (1900), 179 U. S. 69, wet cargo was stowed next to dry cargo in such a position that when the draft of the vessel was subsequently altered through discharge of goods at the other end of the ship, the drainage of the wet cargo reached and damaged the dry cargo; the carrier was held liable, under Harter Act principles, as the cause of damage was deemed a matter of stowage rather than of management of the ship. See, however, the *Indrani* (1910), 177 Fed. 914 (2CCA).

The Nidarholm, 1928 A. M. C. 1266, 26 F.(2d) 92 (DMe), modified 1929 A. M. C. 1356, 34 F.(2d) 442 (1CCA) (rehearing denied, 1930 A. M. C. 67), and affirmed on appeal of one party, 1931 A. M. C. 522, 282 U. S. 681, was a case under a charter party; a cribbing, constructed to support a high deckload of timber cargo, carried away when the vessel, being tender, took a sharp list, and much cargo slid overboard. The terms of carriage were private, and the Harter Act did not apply; the charter however similarly provided that the charterer should "load, stow and trim" his cargo "under supervision of the master." All three courts considered that this was a matter of "load, stow and trim" of cargo, rather than management of the ship. The District Court said that the shipowner and master were alone at fault, as the cargo was to be "loaded, stowed and trimmed" by the charterer under the master's supervision; the C. C. A. divided the liability between shipowner and charterer, as the latter had built the cribbing with insufficient strength; and the Supreme Court, in affirming upon the sole appeal of the charterer, intimated that if the shipowner had also appealed, the whole liability would have been placed on the charterer.

In the *Exmoor,* 1939 A. M. C. 1095 (2CCA), tobacco was damaged by heat and decay induced by valonia (acorn cups) stowed in the same compartment. Such stowage is not a deviation: *Chester Valley,* 1940 A. M. C. 555 (5CCA).

A negligent method of discharging a barge under direction of the bargemaster relates to care of cargo. *Jos J. Hock* (2CCA), 1934 A. M. C. 1253. Likewise failure to insure a liner's stability during discharge, when her upper works were overweighted with ice, was held not excusable because not an error in management of the ship, in the *Germanic* (1905), 196 U. S. 589. But overloading a lighter (used in transshipping cargo in port) was excused in the *Bowling Green* (EDNY), 1935 A. M. C. 697, affirmed without opinion (2CCA), 1936 A. M. C. 481, on the ground that the lighter was a private carrier, against which negligence had to be affirmatively proved; the owner of an adjacent vessel was held liable for causing the loss by permitting the overhang of his vessel to project over the laden lighter.

Proceeding to sea in disregard of storm warnings with a well-found vessel is excused as an error of navigation, *Hanson* vs. *Haywood*

(1907), 152 Fed. 401 (7CCA); *Iowa,* 1938 A. M. C. 615, 1941 A. M. C. 111 (DOre); but not so if the vessel is not suitably seaworthy for the expectable bad weather: *Texas & Gulf S. S. Co.* vs. *Parker* (1920), 263 Fed. 864, at 867-8 (5CCA). But this is not necessarily so in the case of a tug with a tow. *Rob Roy and Howard E.* (2CCA), 1937 A. M. C. 1088; *Transmarine No. 126* (2CCA), 1937 A. M. C. 875.

Collections of earlier authorities will be found in LORD & SPRAGUE'S *Cases on Admiralty* and in the various editions of SCRUTTON on *Charter Parties* and CARVER on *Carriage of Goods by Sea.*

Inherent vice and insufficient packing. These two subjects may conveniently be discussed together. In each case the logical dilemma is the same. On the one hand it is well settled from ancient times that the ocean carrier is bound to know the characteristics of the cargo which it accepts, and to do whatever is reasonably necessary to provide a ship and stowage, including dunnage, which will result in the cargo being carried safely and delivered at destination in the same good order and condition as when received at the place of shipment. On the other hand, the ocean carrier and ship are not responsible for the inherent character of the article offered, nor for the method of its wrapping by or on behalf of the persons who tender the goods for shipment. When these two doctrines clash, the trade must come to an accommodation between ideal perfection of stowage and entire disregard of the safety of the goods. The accommodation so arrived at by custom becomes a standard which the Court will read into the contract of carriage; it thus becomes the measure of the carrier's liability. When customary stowage results in damage to cargo of which the cargo owners complain, the burden of proof of the unreasonableness of the customary stowage is on the cargo interests. *The Silversandal* (*Bache* vs. *Silver Line, Ltd.*), 1940 A. M. C. 731, 110 F.(2d) 60 (2CCA). That case involved bales of crude rubber wrapped and banded in Singapore and transported to New York; it was complained that the bales turned out twisted and misshapen, which made it difficult to feed them into the slicing machines in the factories where they were to be treated; they were consequently diminished in value. The value of the commodity did not make it worth while for the cargo owners to spend more money for more rigid packing; the low freight rates prevailing did not justify the carriers in spending more money on dunnage or platforms to relieve pressure on the bottom tiers. The Court dismissed the complaint, saying that the demands of the cargo owners were themselves unreasonable, and that the customary stowage of the bales of rubber in the condition in which they were commonly tendered to the carriers had not been shown to be unreasonable.

A similar situation arose in the trade in unboxed motor cars; while the carrier was held liable for dents and major scratches which happened during the loading and also during the discharging, as well as due to the vehicles sometimes touching each other because of the liveliness of the springs as the ship rolled and pitched at sea, on the other hand, the carrier was excused from minor scratches unavoidably incident to handling articles offered in an unwrapped condition. *The Southern Cross,* 1940 A. M. C. 59 (SDNY).

Sometimes the pleadings disclose on their face that the loss was due to inherent vice of the cargo. In the *Western Prince,* 1937 A. M. C. 1526 (SDNY), the libel alleged damage to grapes carried in refrigeration from Buenos Aires to New York. The answer set up bill of lading exceptions against spoilage of perishables and the like. The sufficiency of the answer was challenged upon motion, but it was upheld as sufficient.

In domestic trades under the Harter Act, the defense of inherent vice may be pleaded without necessity of showing due diligence to make the vessel seaworthy in all respects. *The Maui,* 1940 A. M. C. 1299 (9CCA).

Inherent vice characteristics of various commodities have been discussed in the following cases:

Philippine sugar: *The Glasgow Maru,* 1939 A. M. C. 281 (2CCA); *The Naples Maru,* 1939 A. M. C. 1087 (2CCA); *The Culberson,* 1939 A. M. C. 138 (SDNY); *The Silversandal,* 1940 A. M. C. 731 (2CCA).

Bananas: *The Smaragd,* 1938 A. M. C. 1, 302 U. S. 556; *The Heranger,* 1939 A. M. C. 369 (9CCA).

Corn: *The Nelson Traveller,* 1938 A. M. C. 752 (9CCA).

Fishmeal: *The Ferncliff,* 1938 A. M. C. 206 (DMd); affirmed on the merits without opinion, 1939 A. M. C. 1420, and considering and discussing all fishmeal cases.

The Both-to-blame Collision Clause.

The Convention and the Acts do not expressly authorize nor forbid the Both-to-blame collision clause. The Convention could hardly forbid it, because the rule of the clause was embodied in the Collision Convention of 1910, which was examined, signed and recommended

by the same Diplomatic Conference on Maritime Law (Fourth Session, 1909-1910) which examined, signed and recommended the Bill of Lading Convention at its Fifth Session, in 1922 and 1923. The Collision Convention being the accepted law practically everywhere except in the United States, the Both-to-blame clause is of no importance or interest anywhere except in the United States, where we have our peculiar doctrine. Canadian shipowners, who may be sued in the United States, also insert both-to-blame clauses in their bills of lading; and its use may be noted in any trade which brings vessels to the United States.

The purpose of this clause is to avoid the result of the *Chattahoochee* doctrine, (1899) 173 U. S. 540, and to achieve, by an agreement of the type approved by the Jason case, the same result in the distribution of cargo losses which is achieved in practically every other maritime country of the world by the rule of the Collision Convention of 1910. The United States alone, of the Great Powers possessing large merchant fleets and important marine insurance markets, adheres to the peculiar doctrine that cargo in ships does not accept the same proportion of fault as its carrier ship in a both-to-blame collision; the American doctrine permits cargo to sue the other ship for its full loss, and then permits the other ship to add the cargo recovery to its items of losses to be divided with the carrier ship. In this way, the carrier ship pays one-half of the loss of its own cargo when there is a both-to-blame decision, although it pays none of the loss of its own cargo if the decision is that all the fault is on one ship alone. This curious anomaly, that the carrier pays more if his navigators are half at fault than if they are solely at fault, has long been a source of friction. The practical effect is that, whenever a collision is held to be the fault of both ships, the cargo underwriters recoup half their losses (subject, of course, to limitation of liability provisions) from the shipowner's protection and indemnity underwriters. In Canada, Great Britain, and in fact throughout Europe and also in Japan, Mexico, Brazil, Argentina and Uruguay, the uniform rule is that cargo recovers from "the other ship" the proportionate part of its loss corresponding to the degree of fault of the other ship as determined by the court in the collision suit, and "the other ship" does not add this element of loss to its other items of damages to be divided with the carrier ship. This striking difference between the law of the United States and the law of the other shipping nations has sometimes led shipowners

to adopt extraordinary precautions to avoid being sued in the United States; and has also given rise to some remarkable efforts to maintain suits in the United States in order to gain the advantage of the American rule. Thus in *Mantadoc-Yorkton* (*Canada Malting Co.* vs. *Patterson Steamships, Ltd.*, 285 U. S. 413, 1932 A. M. C. 512), two Canadian ships with Canadian cargoes collided on the Great Lakes, and the collision litigation having proceeded in Canada, where the rule of the *Milan* (1861), 167 Engl. Repr. 167; Lush. 388, would have been applied to give the cargo half damages, some cargo underwriters sought to maintain a cargo-damage suit in Buffalo upon a libel *in personam*, supported by writ of foreign attachment of another ship of the same owner; the Court declined to take jurisdiction, and was upheld in this attitude by the Circuit Court of Appeals and the United States Supreme Court. Again, in the *Mandu-Denderah*, 1936 A. M. C. 816 (EDNY), German and Brazilian vessels collided in Brazil, and foreign underwriters of foreign cargo sued one of the vessels in New York in order to recover the cargo damage to the full extent instead of proportionately; the Court, however, held that the uniform both-to-blame law of Germany and Brazil, being properly pleaded, would be received in evidence. Subsequently the court dismissed all the claims on the ground that an American insurance company could not act as plaintiff in order to collect losses for the real parties at interest which were foreign companies, 1937 A. M. C. 1062 (EDNY) and 1938 A. M. C. 45 but this ruling was reversed on appeal 1939 A. M. C. 287 (2CCA) holding that assigned claims may be sued upon in admiralty as freely as at law. The case was then tried on the merits, resulting in a finding of half liability for the collision, and hence of half damages for the cargoes. 1939 A. M. C. 1313 (EDNY); but on appeal the liability was apportioned 20% and 80%, 1940 A. M. C. 1150 (2CCA), so that the cargo of the *Denderah*, after this prolonged effort to recover damages from the *Mandu*, recovered only 20% of its provable damage. Certiorari was denied, 1941 A. M. C. 241.

The validity of the Both-to-blame clause under the Hague Rules is said to be doubtful, because it is argued, the clause can only be good subject to the catch-all exception, (q); to obtain the benefit of such an exception, the shipowner must prove that the loss occurred without the negligence of any of his servants. As a both-to-blame collision can hardly occur without the negligence of the carrier's servants it is said that the clause is necessarily bad. On the other

hand, the clause merely expresses the exact policy expressed by the first statutory exception (a): "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation of the ship." Plainly a carrier is not liable at all for a negligent collision loss produced *solely* by the errors of navigation of his servants. Why then should he not be free to contract that he shall not be liable when the same loss is produced *partly* by the errors of navigation of his servants, and partly by the concurrence of strangers? In truth, it would seem unnecessary to make a contract in order to obtain an exemption which, being granted in full, is necessarily granted in part. If the clause should be held bad, then the curious result would be that clause (q), which is a general catch-all, has been allowed to over-ride the express policy of clause (a), which is specific. The rule of policy announced in *Jason* (1912), 225 U. S. 32, that parties may lawfully contract in derogation of the common-law rule if they adhere to the standards of conduct laid down by Congress for analogous situations, would seem to justify the Both-to-blame clause. This contentious subject would be solved if the Senate should consent to ratification of the Collision Convention, now pending before it with a favorable report, and Congress enact a corresponding statute applicable to voyages on the high seas, on the coasts, and on the Great Lakes, if not to all navigable waters subject to the admiralty and maritime jurisdiction of the United States. The validity of the Both-to-blame clause was sought to be tested in the *San Vincente-Bruce* collision litigation, 1938 A. M. C. 232 (2CCA), certiorari denied, 1938 A. M. C. 705; but the fact that one of the vessels, sailing under Harter Act conditions, was not *in all respects* seaworthy under the *Isis* rule, prohibited the operation of the clause.

Precious Merchandise. Ever since the statute of 1851 * water carriers have been relieved of all liability for money, precious metals, works of art and other articles of high value, unless the nature thereof has been fully disclosed by the shipper and a proportionate "value" freight paid. It should be noted that R. S. 4281 has been expressly re-affirmed by Section 8 of the Carriage of Goods by Sea Act, which states the "the provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of * * * sections 4281 * * * of the Revised Statutes of the United States or of any amendments thereto * * *."

* R. S. 4281, 46 U. S. Code 181. Text in Appendix C, post.

Fire.

The Convention and the Acts repeat the well-known Fire Statute of Great Britain (1894); 57 and 58 Vict., ch. 60, as Exception (b) of Section 4 (2). The American form of the Fire Statute, R. S. 4282, dating from 1851, has not been repealed; on the contrary, it has been expressly preserved, by Section 8. Hence the "fire" exception now occurs twice in the U. S. Statutes at Large, in the following forms:

R. S. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Act of 1936: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * fire, unless caused by the actual fault or privity of the carrier."

The difference in the choice of words would not seem to make any difference in the rule of law; and it is thought that the well-settled line of cases concerning fire losses and recently exemplified by the *Galileo* (1933 A. M. C. 1, 287 U. S. 420) and *Cabo Hatteras* ([SDNY] 1933 A. M. C. 1587, 5 F. Supp. 725) cases, continue to represent the law on this subject. The burden of proving "design or neglect" or "actual fault or privity" remains upon the party libellant.

In the *Doris Kellogg,* 1937 A. M. C. 254 (SDNY), affirmed without opinion, 1938 A. M. C. 158 (2CCA), neglect was proved, in the fact that the owner, after a first fire had revealed that the electric wiring system was worn out, had replaced only a part of it, after which a second fire occurred where the old wiring was still in place. In the *Zaca,* 1937 A. M. C. 1153 (SDNY), affirmed 1939 A. M. C. 912 (2CCA), certiorari denied, 1940 A. M. C. 144, on the contrary, neglect was not proved; the final attack centered upon the location of the fuel oil valve reach rods so close to the fidley top that they could not be approached after a boiler room fire had developed considerable heat.

The *Zaca* opinion also pointed out that the defence of the American Fire Statute, when made good, does not of itself operate to give the shipowner a right to claim General Average; and hence the court

refused to follow the English rule, under the English Fire Statute, as laid down in *Louis Dreyfus & Co.* vs. *Tempus Shipping Co.*, [1931] A. C. 726 (H. L.).

In the *Sandgate Castle case*, 1939 A. M. C. 1576 (SDNY), neglect was proved, in that hasty repairs had been made after an unsatisfactory voyage, in order to keep the next loading engagement, and fire resulted when fuel oil overflowed from installations which were not in proper order.

The *Morro Castle* fire never came before the court for civil adjudication of liability; the settlements are reported at 1939 A. M. C. 895.

The Fire Statute of 1851 originally applied to "goods," which term was held to include baggage: *Chamberlain* vs. *Western Trans. Co.* (1871) 44 N. Y. 305. In the revision of 1874 the word "goods" was struck out, and it is now held that fire damage to baggage is no longer excused by the statute: *Marine City*, (1881) 6 Fed. 413 (DMich); the Statute however applies to every other species of merchandise on board.

Liability for Loss by Fire, Before Loading or After Discharge.

It has been settled that the statutory exemption of the Fire Statute may, by appropriate contract stipulation, be extended to cover fire situations on shore before loading and after discharging; the authority of these cases would seem to be undisturbed. *Munaires* (EDLa), 1936 A. M. C. 95, 12 F. Supp. 913. Indeed, in *Constable* vs. *National S. S. Co.*, (1894) 154 U. S. 51, 59, the ocean carrier was exonerated from liability for a fire destroying cargo which had just been placed upon a pier, without any clause extending the protection of the Fire Statute, and merely because the liability became that of a warehouseman immediately upon discharge.

Coastwise through bills of lading provide that the carrier shall be liable for loss as at common law, with exceptions, including the exception that the carrier shall be liable only as a warehouseman for fire loss after expiration of the free time allowed by tariffs for delivery of goods at destination. Under such clauses, it was held in *Galveston Wharf Co.* vs. *Galveston Ry.*, 1932 A. M. C. 463, 285 U. S. 127 that the port connecting railway, which had received the cargo from the water carrier, was liable for fire loss on its pier regardless of negligence; and in the *Acadia* (*Standard Brands* vs. *Eastern S. S. Lines*), 1938 A. M. C. 933 (2CCA) that the water carrier, which had placed the goods on a pier awaiting delivery to the consignee, was not liable for a fire loss after expiration of the free time.

Fire during lighterage while trans-shipping from one ocean vessel to another appears to present a special problem, unless the lighter is actually owned or operated as owner *pro hac vice* by one of the ocean carriers; for if the lighter is hired, the ocean carriers are not such "owners" as may claim the protection of the Fire Statute. *Sydney*, 1940 A. M. C. 1037 (2CCA). See the discussion of lighterage, post.

The Exception of Strikes and Lockouts.

The American Act, in Section 4 (2), sub-paragraph (j), contains a proviso which is not at present found in any other Hague Rules text: to the effect that the exception of liability for strikes and lock-outs "shall not be construed to relieve a carrier from responsibility for the carrier's own acts." This was the second of the six American amendments. The fear was expressed, by some persons present at the 1930 Chamber of Commerce Conference, that a carrier who knew that he had, by acts of negligence for which he was legally liable, caused damage to cargo, might deliberately incite a strike or declare a lockout of workmen, in order to be in a position to plead the exception of strikes and lockouts. There had been prolonged strikes in Havana, and cargo interests complained that ocean carriers had made unfair use of the "strikes" exception clauses, to save time and money for the ships at the expense of the cargo. Judge HOUGH had expressed the view, in 1926, that this fear was wholly unfounded, because of the general principle that no man can take advantage of his own wrong. The fear, however, persisted, and the amendment was accepted. It stated nothing new. A severe series of strikes swept over the waterfront in 1936 and 1937; and it may be remarked that up to the present, no litigation concerning these strikes seems to have reached a result different from that which might normally have been expected had the proviso not been enacted.

While it has been said that a strike is almost always a matter of money, and can be ended by a money payment, the courts take the view, in charter cases, that an offer of increased wages need not be made, as the opposite view would in effect erase the exception of strikes in most cases. *Hawkhurst* vs. *Keyser*, 1897 (N. D. Fla), 84 Fed. 693; *Toronto*, 1909 (2CCA), 174 Fed. 632; *Themis*, 1917 (SDNY), 244 Fed. 545, affirmed (2CCA), 275 Fed. 254. These cases would seem, by analogy, to be applicable in bill of lading cases.

In the *Nordhvalen* case, 1923 A. M. C. 398 (SDNY), the vessel reached the port (Pernambuco) after the strike was over, but before

the congestion was relieved, and the vessel was held relieved from liability by the operation of the strikes clause.

A strikes clause is not a negligence clause; hence a carrier operating under the Harter Act may invoke the clause without proof of seaworthiness or due diligence "in all respects." The *Maui*, 1940 A. M. C. 1299 (9CCA).

War.

The King's enemies has long been one of the common law defences permitted to a carrier; and restraint of princes has never been regarded as a contract exception contrary to public policy. The Harter Act, Section 3, excuses loss or damage caused by public enemies. The Act of 1936, Section 4, (2), excuses loss or damage arising or resulting from (e) act of war, (f) act of public enemies, (g) arrest or restraint of princes, rulers or people, (k) riots or civil commotions, and the catch-all (q) "any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof" under (q) is placed on the carrier.

These very terse words and phrases have a large meaning, which has been only partially developed by the case law growing out of the Napoleonic wars, the Crimean and Franco-Prussian wars, the Great War of 1914-18, and the other occasions which gave rise to states of fact brought to the attention of the courts. Events since 1933—the Japanese action in Manchukuo and later in Central and Southern China, the Italian action against Ethiopia, the Spanish Civil War, and finally the general outbreak of war in 1939—have caused great and sudden dislocations of trade and trade routes, requiring the fullest considerations of the implications of these exceptions. At the same time, the whole question of insurance coverage of the risks of war, civil commotion, restraint of governments, and delay resulting therefrom was necessarily reconsidered. In consequence, two clauses were devised in London, in general agreement between the interested parties—carriers, owners of merchandise and underwriters—, one to express in full detail the rights and duties of the carrier in the event of war, and the other in the event of restraint of princes. These clauses are respectively numbers 4 and 5 of the Uniform North Atlantic bill of lading, printed at pages 83 and 84 of this volume. The extent of the general agreement as to these clauses is evidenced by the fact that, to the date of this writing (May, 1941), no case or

dispute as to their scope or meaning appears to have been carried to the point of a judicial decision, so far as has been noted. The many and serious dislocations of trade since 1933 have undoubtedly given rise to numerous states of fact and losses which would justify litigation as to the limits to be placed upon the application of these clauses. The virtual absence of such litigation is a potent indication that these clauses express the considered view of the maritime and underwriting community and that the various actions taken by carriers and ship masters in the face of the many dislocating situations have met with approval.

The absence of litigation on these points is also doubtless due in large part to the speed of radio communication and the general use of "held covered" clauses, in consequence of which it has been possible, to a degree unknown in earlier war periods, to advise the interested parties almost instantly of delays and deviations, and to hold the changed risk covered under the original policies.

Restraint of Princes.

Lord Tenterden, writing in 1802 (*Abbott on Shipping*, 1st ed., 1802, 5th American edition, 1846, page *390), laid down the rule that "restraint must be actual and operative, and not merely expected or contingent"; he cited *Atkinson* vs. *Ritchie* (1809), 10 East 530, 103 Eng. Repr. 877 (K. B.) where a vessel left St. Petersburg with only a part cargo of hemp (not waiting to screw it down and so make room for more cargo) on a rumor that Russia would embargo foreign ships, and was held liable for breach of charter, the court saying that "it is necessary that an actual change in the political relations shall have taken place," and that danger should be "clear, immediate and certain." In those days, before telegraphs and radio, with short gun ranges, and no aviation, it was apparently thought suitable to compel the ship master to wait until the approaching embargo or requisition officers could be seen. It is suggested that the tremendous change in the means of communication, and of the offensive power of possible captors and "restraining princes or peoples" has swept away the fact basis on which Lord Tenterden's view were based. In these days, a freighter which proceeds on its normal course until in the physical presence of the enemy—whether a surface vessel, a submarine, or an armed aircraft—is in gravest danger of loss; and common sense dictates the advisability of acting to avoid such danger long before an enemy is present. See *Middows, Ltd.* vs. *Robertson* (The *Halle*, *Minden* and *Wangoni*) (1941) 68 Lloyds L. R. 45 (C. A.).

Seizure Under Legal Process.

The Act of 1936 and the Harter Act both excuse the carrier from liability for "seizure under legal process." Mr. Fitz-Henry Smith, sitting as Commissioner in *The Penobscot,* 1940 A. M. C. 1217, 1232 (DMass) held that under the Harter Act this refers to seizure of the *goods,* not of the vessel. He refused to follow two Louisiana District cases where a carrier was excused because his vessel was arrested.

Breakage—Pilferage—Rust—Exceptions Not Otherwise Enumerated, and Falling Within the Catch-all Exception (q).

An authoritative pamphlet of 1921 listed 55 excepted risks, acts of negligence or causes of liability actually then in use in bills of lading. Of these, 16 are explicitly authorized by the Convention, Article IV (2), (a) to (p), and thus granted by law under the Acts. The other 39 retain only such validity as is granted by the "catch-all" exception which is known as Section 4, subsection (2), paragraph "q." This provides in broad terms that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * any (other) cause arising without:

"(1) the actual fault and privity of the carrier and

"(2) without the fault or neglect of the agents or servants of the carrier,

"but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

In the *Lady Drake,* a cargo of molasses in casks came adrift in heavy weather between Bermuda and Halifax. The shipowner pleaded that the loss was due to peril of the sea, and that it had sustained the burden of proving that there was no negligence in accordance with subsection (q). The Supreme Court of Canada, affirming the courts below, said:

"It was very vigorously urged by counsel on behalf of the ship that he had established a *prima facie* case of absence of negligence by proving proper stowage. But it will be observed that the burden resting upon the carrier under this clause is a very heavy one. He has to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents of servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given." 1937 A. M. C. 290 at 292.

It is very generally considered that paragraph "q" in and of itself gives the ship and carrier as much protection as can be obtained by enumerating any or all of the 39 exceptions formerly recited which are not expressly enacted in subsections (a) to (p). Thus a carrier is not liable for rust damage to canned goods caused by atmospheric moisture and sweat: *King City,* 1940 A. M. C. 1127 (NDCal).

Dangerous Goods.

The Convention and the Acts deal with dangerous cargoes in considerable detail; the provisions of Article IV (6) do not differ materially from the previously accepted law. Hence the special clauses heretofore used may be dispensed with.

The Criminal Code provides drastic punishments for the carriage of dangerous cargoes in passenger vessels, and for their undisclosed shipments in freight ships. These are referred to in the notice appended to the Uniform North Atlantic Bill of Lading, at page 91, supra. Elaborate regulations as to the packing and handling of various kinds of dangerous goods are published by the Interstate Commerce Commission and the Bureau of Explosives; the latest edition is dated January, 1941.

Clauses Not Regulated by the Act.

Port clauses, regulating the further handlings of the cargo after it has left the end of the ship's tackle, are wholly free of regulation by the Act; but still are subject to the Harter Act, if the bill of lading does not expressly terminate the carrier liability at the end of ship's tackle. Any decided cases as to the effect of the Harter Act on port clauses therefore continue to be authoritative precedents.

Trans-Shipment Clauses—Effect of the Act of 1936.

If a ship loaded in the United States trans-ships an outward cargo at a port where the Rules are not in force, will the on-carriage be subject to the American Act? It has been said that the Act relates to the carriage of goods by sea in ships; consequently the Act which governed

the bill of lading at the first port of shipment would appear to apply to the carriage of the goods until they reach the port of delivery named in the bill. A mere trans-shipment under the same "bill of lading or other document of title" should not change the law of the contract.

If a ship loads cargo abroad and issues a bill of lading naming a United States destination, the foregoing principles would seem to indicate that the American Act should apply to the bill of lading, even if the first ship never comes here but trans-ships the cargo. This would not be the case in Canada, whose Act does not apply to inward cargoes.

It may be noted that the Warsaw Convention for the unification of certain rules concerning carriage of goods by air expressly provides that the Convention shall govern the entire carriage by air, regardless of how many times the goods may be trans-shipped, and thus disposes of this somewhat difficult question in advance, 49 U. S. Stat. L. 3000.

If goods moving between ports where the Rules are not in force are trans-shipped at a port where the Rules are in force, it would seem that the Rules might apply to the on-carriage if there should be an interruption of the movement and a new bill of lading contract at the trans-shipment port.

Trans-Shipments. A vessel receiving goods from an initial carrier under a through bill of lading must be cautious about varying the terms and conditions of carriage, unless the goods owner consents. When the bill of lading is negotiable, and has been negotiated, it is usually impossible to find the goods owner; and in that situation it may be wiser to decline the proferred cargo, rather than risk liability for loss or damage due to variation in the method of transportation. Thus in the *Idefjord,* 1940 A. M. C. 204 (SDNY), affd. 1940 A. M. C. 1280 (2CCA), the through bill of lading called for underdeck stowage, which the on-carrying *Idefjord* was unable to arrange, so the cargo was temporarily carried on deck; the on-carrier was held liable for resulting loss. Again, in the *Cayo Mambi—Maihar* case, 1933 A. M. C. 238 (2CCA), goods shipped under a £100 bill of lading were trans-shipped and sent along under a $100 bill of lading; and the on-carrier having paid $100, which was less than the actual loss, the initial carrier was held liable for the excess of $127.50 per package.

When trans-shipment is performed by means of a hired lighter, special considerations arise, which are discussed under Lighterage, post.

Clauses stating that each carrier, of a connecting series, will be responsible only for damage occurring while the merchandise is in the carrier's control, are valid and effective: *President Taft* (*China Vegetable Oil Co.* vs. *Dollar S. S. Lines*), 1938 A. M. C. 279 (SDNY).

Lighterage.

The Convention and the various Carriage of Goods by Sea Acts all approach carriage from the point of view of the single sea-carrying vessel "from tackle to tackle," Art. 3(3). Local lighterage, whether before loading, or upon a trans-shipment, or after discharge, may therefore be contractually dealt with, subject to general principles as modified by other statutes, such as the Harter Act in the U. S. A. or the Merchant Shipping Act in Canada.

Lighterage is almost always a harbor operation; lightered cargoes are seldom handled at sea, but a great deal of cargo is transferred by lighters in open roadsteads in the West Indies, on the west coast of Central and South America and in African trades; long lighterages in sheltered bays and rivers are also usual in several places, such as Maracaibo, Para, and Puerto Alegre. It is therefore important that the contract should be precise as to the responsibility for lighterage. Several options are available.

Lighterage by cargo-owners. The shippers or consignees of the cargo may do their own lighterage with equipment furnished by themselves at their own expense. If so, the ocean vessel's liability literally commences and terminates at the end of her tackle. *Cullen* vs. *Hedger,* 290 U. S. 82, 1933 A. M. C. 1584. *T. N. 73,* 1940 A. M. C. 1361 (2CCA). It is of course simple for the ocean carrier thus to wash its hands of all lighterage questions. The inconvenience of this system is that discharge may be delayed by non-arrival of the lighters. In that event the ship's agent or master sometimes hires lighters for account of the absent or delaying cargo-owner. If a careless lighterman is so hired, or if his lighter is unfit or unseaworthy, responsibility would seem to be placed on the agent or master who has undertaken to act for the cargo owner. In the case of *Excambion,* 1934 A. M. C. 456 (City Court of New York), the court said that, in the absence of a suitable agreement, the agent could not act as the consignee's agent in respect of lighterage, at least not until the consignee had been notified to attend to the business and had failed to select or send his own lighter. A clause which will permit the agent at a port of discharge to act as the agent of the consignee in furnishing lighters, in the event that the consignee neglects to send lighters promptly when the ship anchors off the port, is thought to be valid.

Lighterage by ocean carrier. At the other extreme, the ocean carrier may accept all responsibility for lighterage, contracting to carry the goods to or from points on the shore, and charging an appropriate freight rate. On these terms, the carriage is performed by a series of the carrier's vessels, with suitable disclosure that there will be trans-shipments, and the "tackle to tackle" coverage of the Convention and the Acts will extend from the receiving tackle of the carrier's first lighter or vessel to the delivering tackle of the carrier's last lighter or vessel.

Lighterage by independent contractor. Lighterage may be performed by an independent lighterage agency, not in any way a subsidiary or agent of either the goods-owner or of the ocean carrier. In this situation it may be proper to have an agreement between the ocean carrier and the lighterage carrier for the interchange of traffic, the division of freight charges, and responsibility for losses, and for delay on the part of either carrier in reaching the agreed trans-shipment point. In suitable situations such agreements might be submitted to the Maritime Commission for approval, like other joint-service agreements.

A lighterman who carries only cargo given him by an ocean carrier for trans-shipment is not a common carrier but a bailee for hire, and is not liable for a loss unless negligence is proved against him. *Bowling Green,* 1935 A. M. C. 697 at 699, 11 Fed. Supp. 109 (EDNY).

Lighterage by an independent contractor acting for either party. It commonly happens that the party required to attend to lighterage has no lighter of its own available at the moment, so that an "outside" lighter is obtained. When this is done by the cargo-owner, a direct relation of bailor- and bailee-for-carriage is established between the cargo owner and the lighterman; if there is a cargo loss on such a lighter, the issues as to liability are worked out along those lines. *T. N. 73,* 1940 A. M. C. 1361 (2CCA); *Cullen* vs. *Hedger,* 290 U. S. 82, 1933 A. M. C. 1584; *Fred E. Hasler,* 1932 A. M. C. 237 (2CCA). But when the "outside" lighter is procured by the general or ocean carrier, the considerations may be quite different.

Colton vs. *New York & Cuba Mail Steamship Co.,* 1928 A. M. C. 1391 (2CCA), was a case of lighterage in New York during a transit from Liverpool to the West Indies; the cargo (potatoes) was frozen while on the lighter and the cargo owner sued the second ocean carrier, in the form of a claim in an equity receivership proceeding. The Court held that the lighterage was part of the transportation and governed by the Harter Act; clauses stating that "trans-shipment by the usual method of conveyance should be at the sole risk of the owners of the goods and the expense of the carriers" and that "ship not accountable for damage by frost" were therefore invalid and the ocean carrier was liable for the loss. The Court said: "The words *at the sole risk of the owners of the goods* are to be strictly construed. They do not in terms cover the negligence of the carrier. Furthermore, trans-shipment in an open lighter was not *by the usual means* called for by the contract of affreightment."

The case of *The Irving* (*Connors Marine Co.* vs. *Manhattan Lighterage Corp.*), 1936 A. M. C. 1029 (EDNY), affirmed without opinion, 1937 A. M. C. 1133 (2CCA), concerned the loss of a cargo of molasses in barrels caused by the careening of an unseaworthy lighter on which the cargo was being transferred from Seatrain Lines to a destination in New York harbor. The lighter owner was held primarily liable to the cargo owner. The charterer of the lighter and the ocean carrier were both held secondarily liable under their contracts of carriage and bills of lading respectively. To the same effect see *Taylor Bros. Lumber Co.* vs. *Lighter Sundial,* 1930 A. M. C. 1336 (2CCA).

The Bowling Green (*Czarnikow-Rionda* vs. *Ellerman*), 1935 A. M. C. 697 (EDNY), affirmed without opinion 1936 A. M. C. 481 (2CCA), concerned a cargo loss from the trans-shipping lighter *Bowling Green* in New York harbor due to negligence of third parties—namely a tugboat which placed the lighter *Socony No. 175* alongside the *Bowling Green* overnight in an improper position so that the overhang of the *Socony* knocked part of the cargo of the *Bowling Green* overboard. All parties being impleaded, the Court entered a decree against the owners of the tug and lighter *Socony* and exonerated the ocean carriers and the *Bowling Green,* her owners and charterers.

The situation disclosed by *The Lighter Sydney* (Fire) 1940 A. M. C. 47 (SDNY), 1940 A. M. C. 1037 (2CCA), affirmed on rehearing, 1940 A. M. C. 1540, is particularly disquieting. Two ocean carriers had an arrangement for a through service with trans-shipment in New York. As the vessels came to different piers, the cargo was lightered in New York harbor and held on the lighter until the second vessel should reach port. While on the lighter, a negligent fire occurred and the cargo was destroyed. A suit was brought against both ocean carriers and the lighterage company. The lighter owner pleaded the Fire Statute, R. S. 4282, which exonerated it despite the negligence

of its servants. The ocean carriers, however, were not permitted to plead the Fire Statute because they were not the owners of the lighter; on the contrary, they were held liable because the loss happened through the negligence of their agent, the lighterage company.

These considerations suggest that the quick and informal service of lighterage—so essential to the rapid movement of cargo in any great port—may have to be technically re-organized in order to meet the rigid requirements of statutes realting to liability as construed by the Courts. The custom of oral chartering on a daily rent with a bargee or lighter-captain supplied by the lighter-owner has long been supposed to be a demise. *U. S.* vs. *Cornell,* 267 U. S. 281; 1925 A. M. C. 547; *Donnelly,* 1929 A. M. C. 586 (2CCA); *Hughes Line,* 1930 A. M. C. 904 (2CCA); *Doyle,* 1939 A. M. C. 857, 1491 (3CCA). Yet for Fire Statute and Limitation purposes it may be necessary to go a step further and transfer formal control of the bargeman to the charterer, as this may not be within the custom. *James Horan,* 1935 A. M. C. 1081 (3CCA); *Cary Brick No. 8,* 1925 A. M. C. 1410 (SDNY); but see *Atlas No. 7,* 1930 A. M. C. 1029 (SDNY).

Deck Cargo.

Section 1 (c) of the Carriage of Goods by Sea Act, 1936, expressly states that the Act does not apply to "cargo stated to be carried on deck and actually so carried." This was done for the relief of the Baltic timber trades, which were thus given local freedom of contract. Consequently deck cargo is governed by the pre-existing law, which in America included the Harter Act. However, the 1936 Act does not expressly preserve the Harter Act as to deck cargo from "tackle to tackle"; Section 12 merely preserves the Harter Act before loading and after discharging. There would seem to be no positive legislative expression to preclude the shipper and carrier from voluntarily contracting that the provisions of the 1936 Act shall govern their "tackle to tackle" relations in respect of deck cargo. The practice therefore seems to be to carry deck cargoes "at shipper's risk as to perils of the sea" and, for every other legal relation, conformably to the provisions of the Carriage of Goods by Sea Act, 1936.

A "clean" bill of lading is an unwritten representation that the cargo will be carried under deck, unless there is a custom or usage of the trade permitting on-deck carriage, or a custom or usage as between the carrier and the particular shipper. *The St. Johns, N. F.,* 1923 A. M. C. 1131, 263 U. S. 119; *Davidson* vs. *Flood Bros.,* 1929 A. M. C. 213 (9CCA).

After a good deal of dispute and litigation, it seems to be settled that stowage within any permanent steel enclosure, even if technically above the weather deck as designated in the builders' plans—such as a hatch-trunk, a bridge-deck, or a hospital space, is under-deck: *Lossiebank,* 1938 A. M. C. 1033 (StCal); *Fred W. Sargent,* 1940 A. M. C. 670 (EDMich).

The bill of lading may properly state an option, permitting the carrier in any case to stow the cargo on-deck; confronted with such a bill of lading, the shipper desiring under deck stowage must in each case either require an under-deck stowage endorsement, or ascertain whether his goods are on-deck or under deck, so as to arrange his own cargo insurance coverage to correspond with the fact. *Davidson* vs. *Flood Bros.* (*The Carriso*), 1929 A. M. C. 213 (9CCA); *Peter Helms,* 1938 A. M. C. 1220 (WDWash). See DEUTSCH on *Deck Cargo,* (1939) 27 Cal. L. R. 535.

The Nova Scotia law as to deck cargo was dealt with in the case of the *Stranna,* (1938) 60 Ll. L. R. 51 (C. A.), where the vessel tipped while loading and lost the deck cargo overboard.

Live Animals.

The 1936 Act, Section 1 (c) exempts live animal cargoes from the operation of any and every section of that Act. This was done (in all the versions of the Hague Rules) because it is generally recognized that the carriage of live animals presents peculiar hazards, varying with every trade and climate, and not susceptible of standardized control by legislated formulas.

In the United States, it is well-settled, apart from the 1936 Act, that a live animal contract of transportation must be reasonable, in accord with public policy as to the duties of carriers, and in accord with the principles expressed in sections 2, 3, 5 and 6 of the Harter Act. Section 7 expressly provides that Sections 1 and 4 shall not apply to live stock cargoes.

Jurisdictional Clauses.

The Convention and the American and Canadian Acts are silent in respect of clauses agreeing to conduct litigation in some particular jurisdiction to the exclusion of other jurisdictions. Hence the existing law on the subject is unchanged. The American public policy is well settled that such clauses are null and void. *Kensington* (1902),

183 U. S. 263. Yet they have sometimes been referred to with approval in support of the exercise of discretion to decline jurisdiction of foreign torts. [*Tricolor* (2CCA), 1933 A. M. C. 919, 65 F.(d) 392.] It may be noted that Australia and Newfoundland have inserted provisions in their Carriage of Goods by Sea Acts declaring that the jurisdiction of their courts may not be ousted by agreements to litigate elsewhere. Newfoundland, Section 7. Australia, Section 9, (formerly section 6 of the Act of 1904). Such a provision was contained in the Canadian Act of 1910 (section 5), but it was not carried over into the Canadian Act of 1936.

It should be noted that agreements to arbitrate in a foreign place, unlike an agreement to litigate there, are valid. *Shanferoke Coal & Supply Co.* vs. *Westchester Service Co.*, 293 U. S. 449, 1935 A. M. C. 1135, applied in *American Creosoting Co.* vs. *Beechwood* (SDNY), 1937 A. M. C. 1485. Cf. Matter of *Hamburg-American Line* (*Saarland*), 1930 A. M. C. 196, 134 Misc. 481; affirmed 1930 A. M. C. 1300, 228 N. Y. App. Div 802, without opinion.

Free In and Out—Free Delivery—Free Discharge.

It has been suggested that the Rules may invalidate charter party agreements that the owner of the cargo shall load, stow and trim the cargo, or discharge it at his own risk or expense. There seems to be no direct authority on this point. It would have been useful if the Act had expressly stated that a charterer's agreement to load or discharge his own cargo should be valid.

Demurrage.

Doubt has been expressed whether cargo can hereafter be held for demurrage under a charter party if the bill of lading has been negotiated. Inasmuch as no question on the point has been brought to the attention of the British courts under their Act of 1924 nor to the attention of the American courts under the Act of 1936, it may be thought that demurrage claims are being paid without legal contest.

Liens for Dead Freight.

Doubt has likewise been expressed as to the possibility of holding cargo for a dead-freight lien after a bill of lading under charter party has been negotiated. This question has not received judicial attention, and is perhaps not of serious importance.

Lien for Freight.

When inward cargo is in the possession of the Customs, a lien for freight may be filed against it, in accordance with U. S. Code Title 19, sec. 465; the Collector is then bound to withhold delivery of the cargo until the lien is satisfied.

Should the Bill of Lading be Expressed as a Contract Based Upon the Adjustment of the Freight Rate as Consideration?

Although the standardized Hague Rules clauses are imposed by statute and do not require to be supported by legal consideration, the "before and after" clauses, and any transit clauses that may be added will be matters of voluntary contract as heretofore. As they must be supported by some legal consideration, it would seem convenient to adhere to the formula developed under the Harter Act and declare, as heretofore, that the entire bill of lading contract, or at least the agreement as to the value of the cargo, is in consideration of the freight rate.

Shipper's Exemption—Section 4 (3).

This clause, concerning whose scope and possible usefulness there has been much discussion, excuses the *shipper* generally from liability for loss or damage sustained by the *carrier* or the *ship* without the act, fault or neglect of the *shipper, his agents or his servants.* It will be noticed that it does not excuse his assigns, nor the consignee. It has been said that the categorical provisions of Section 3 (5) "that the shipper shall be deemed to have guaranteed to the carrier the accuracy of the marks, number, quantity and weight as furnished by him" are not limited or deprived of effect by the general language of Section 4 (3); and there is no indication that that view is not correct. The scope of the clause in other respects is quite vague.

Voyage—Deviation—Effect.

Deviation in the law of transportation by water is of extraordinary interest because of the remarkable penalty attached thereto—namely, the invalidation of the entire bill of lading contract, perhaps including the statutory clauses, and the substitution of an implied warranty by the carrier that the goods will arrive at destination safely and promptly.

The severity of this rule, and the immense advantage which it gives to the cargo interests naturally attracts the attention of all persons concerned with working out the rights of cargo in any situation of

loss, damage or delay. Strong efforts are continually being made to extend the scope of the deviation rule and turn ocean carriers from bailees into warrantors and insurers. To some extent this pressure has induced carriers frankly to accept an insurers' liability, the rate being adjusted appropriately; when this is done, by the device of the insured bill of lading, no conflict of interests can occur, and the whole subject is circumvented. *Dixon—King* (*Great Lakes Transit Co.* vs. *Interstate S. S. Co.*), 301 U. S. 646, 1937 A. M. C. 697.

The word deviation—from the latin *de via*—is stated in the dictionaries to have two meanings; the first is to turn aside or wander from the way or course; this is a geographical meaning. The second meaning is to err, to transgress, or to sin. Although the author of a recent paper said that "with this latter definition, of course, we have no concern" (Deviation: by Henry P. Dart, Esq., American Bar Association, Section of Insurance Law, Proceedings of the Cleveland Meeting, 1938, p. 384), the argument for the extension of the deviation concept beyond its geographical meaning is based on the idea of transgression. Indeed, it was argued in 1940 that negligent stowage was such a transgression of contract as to be a deviation, in the *Chester Valley,* 1940 A. M. C. 555 (5CCA); a view which the court rejected. Deviation has been defined by Parliament in the strictly geographical sense, in the Marine Insurance Act of 1906, hereinafter quoted.

Neither the Convention nor any Act passed under the Convention contains any provision concerning the legal result of a deviation. Nor is there any other statute on the subject. Consequently the general case law continues to furnish the rule. The cases are not particularly satisfactory. The carrier and the vessel become insurers that the goods will arrive at destination in the same order and condition as when shipped within the time of an ordinary voyage.* Certain exceptions may be noted: A loss by act of God, sea peril, war or restraint of princes, which can be proved would have occurred anyway, may be excused. This was an alternative ground of decision in the *San Guiseppe,* 1941 A. M. C. 351 (EDVa), where the outbreak of war between England and Italy would have caught this Italian vessel 700 miles off the American coast if she had not put into Hampton Roads for bunkers, where the war overtook her.

In marine insurance, the legal result of a deviation is to release the underwriter from his obligation, as from the time of deviation, and the premium is neither refunded nor prorated. English Marine

* *Calderon* vs. *Atlas S. S. Co.,* (1898) 170 U. S. 272 (hurricane); *Niles-Bement-Pond Co.* vs. *D/S A/S Balto,* (1922) 282 Fed. 235 (2CCA) (torpedoed).

Insurance Act, 1906, Section 46 (1); ARNOULD on *Marine Insurance* (12th ed., 1939), sec. 376, p. 540; DART on *Deviation,* Am. Bar Assn., Insurance section, 1938 Proceedings, p. 385. If no loss occurs—as is often the case, since many insured voyages are performed without an insured hull loss—the result is of no consequence; if a loss does occur, the shipowner must repair his own property out of his own pocket. The motive of this rule of release is to keep the risk and the premium in balance. There is no social wrong or offence against public policy in a shipowner sending his vessel where he pleases; he merely cannot compel his underwriter to go along beyond the agreed contractual limits. As DART puts it (p. 385): "If the assured can change the nature of the voyage whenever it suits his convenience and thereby change the character of the risk, any estimate which the underwriter might make, upon which he bases the premium, would be of little or no value."

This precise pattern cannot of course be carried over into bill of lading situations where the shipowner does not own the cargo. A deviation here does not "release" one party; the courts say that it substitutes one contract—an "insurer's liability" contract implied by law in the cases—for another contract, that made by the parties under the Harter Act or Carriage of Goods by Sea Act and expressed in the bill of lading. If there is a cargo loss—and cargo damage and loss is far more frequent than hull damage—the carrier is thus liable to cargo under a harsher contract than the usual bill of lading contract. The motive is not to keep a balance between the freight money and the performance, for the freight may be low or high; the motive is to fix the carrier's thought on performance of his contract to carry by means of a sanction more severe than the ordinary sanction for a breach of contract. *Willdomino,* 1927 A. M. C. 129, 272 U. S. 718.

Of this, John W. Griffin, Esq. has said, in addressing the Association of Average Adjusters:

"The whole doctrine of deviation is a misfit in the law of carriage. It has sometimes produced results which seem, to me at least, both illogical and unjust. It is a principal of a highly penal kind and, like other penal laws, should be construed strictly and should be kept within closely defined limits."

Professor WILLISTON, in the 1920 edition of his great work on *Contracts,* wrote that "logically it is somewhat difficult to accept the English view that the carrier's breach of contract totally displaces the contract" (Section 1096). In the Revised Edition (1936) he notes

without citation or discussion that American courts seem to be following the English view (p. 3081).

Indeed, the cases are not altogether logical. The owner of a deviating vessel loses the benefit of the limitation of liability statutes: *Pelotas,* 1933 A. M. C. 1188 (5CCA); but retains the benefit of the clauses limiting the time for suit: *Carso,* 1937 A. M. C. 1078 (2CCA). Whether the $500 value limitation clause becomes ineffective has not been decided; but contractual $100 clauses were held displaced in *de Vasconcellas* vs. *Sarnia,* (1921) 278 Fed. 459 (2CCA), and *Niles-Bement-Pond Co.* vs. *D/S A/S Balto,* (1922) 282 Fed. 235 (2CCA), over the respective dissents of Judge MACK and Judge HOUGH. The Supreme Court held in the *Malcolm Baxter,* 1928 A. M. C. 960, 277 U. S. 323, that a master who finds, during the voyage, that his vessel has not been adequately prepared to meet the perils of the seas may bear off to a port of refuge without deviating. And it is laid down in the *Ida,* 1935 A. M. C. 302 (2CCA) that a vessel owner may claim and win the benefits of the Fire Statute after his vessel has deviated geographically, there being no causal relation between the deviation and the fire.

The sanctions, whatever they are, are visited on ship and shipowner when the loss occurs during the actual deviation: *Willdomino,* 1927 A. M. C. 129, 272 U. S. 718; *West Aleta,* 1928 A. M. C. 969 (2CCA). But not so when the loss occurs before there is a deviation, for the vessel is then just where she ought to be, and doing what she ought to do. When the loss occurs after the deviation is over, the situation is not clear. The *Ida* fire occurred after the vessel was back on her course—indeed she was in the port of discharge; and in the *Thordoc* the Privy Council said that a stranding loss, after the deviation was over, was excused as an error of management as though no deviation had occurred. *Robin Hood Mills Ltd.* vs. *Patterson S. S. Ltd.,* (1937) 58 Lloyds L. R. 33. Yet it is commonly said that after a deviation has once occurred, the whole remainder of the voyage is performed under "insured" conditions. It is indeed true that an insurance policy, once released by a deviation, does not revive when the deviation is over; but there is high authority that a bill of lading contract is restored to full effect when the vessel is back on her course.

Deviation: The Basic Questions.

Examining any situation with the thought of obtaining the advantage of the drastic sanctions applied by the law to a case of deviation, the following questions must be answered:

1. Was the action complained of expressly permitted by the contract?
2. If not, was it permitted by the custom or usage of the trade?
3. If not, was it reasonable?
4. If not, was it compelled by sea peril, or Act of God, by restraint of princes or war or threat of war?

If all these questions are answered in the negative, there may be ground for finding that there was a deviation with the consequence that the carrier and ship may be held as insurers of the safe and timely arrival of the cargo.

The cases sometimes speak of lawful, proper, or justifiable deviations. If the thing done is within the terms of the contract, or within the usage or custom, or is reasonable, it is submitted that the correct analysis is that there has been no deviation at all; there has, on the contrary, been lawful performance. Only if the thing done is a breach of contract, custom, usage, or reasonableness, but excused as by force majeure, can it be proper to speak of a justifiable deviation.

Deviation: Origins.

The notion of deviation is found in several fields of the law. In the law of highways, a road deviates when it wanders from the surveyor's lay-out; the same is true in railroad law, where real estate rights may depend on geographical lines. In the law of livery-stable keepers, a person who hires a vehicle has been held to deviate by driving further than the terminal fixed in his contract: *Deming* vs. *Johnson,* (1908) 80 Conn. 553 (1st Jud. Dist). As between Master and Servant, the matter is put in terms of express or implied scope of employment; and the master is not liable when the servant goes off "on a frolic of his own." In maritime collision cases, the question is whether a vessel holds her course, or deviates from it. In salvage law, it has been said that deviation may be meritorious; a salvor who risks loss of his insurance coverage, or risks liability to his own cargo, may merit an extra award: *The Plymouth Rock* (1881) 9 Fed. 413 at 417 (SDNY), *The Alaska* (1885), 23 Fed. 597 at 607 (SDNY), although neither case presented this state of facts. A seaman's articles may be breached by a change of voyage: *Moran* vs. *Baudin* (1788), 17 Fed. Cas. No. 9785 (DPa), where the Court remarked that "shipping articles are not to be construed by the same rules with a policy of insurance, their object and ground of reason being quite different." The same remark applies, it is submitted, as between an insurance policy and a bill of lading.

Deviation is most important in the law of marine insurance policies. The contract of marine insurance is one of a peculiar nature. It is based upon fiduciary relation, requiring full disclosure, and the utmost good faith between both parties—*uberrimae fides* is the old Latin maxim. COOLEY, *Insurance Briefs* (2nd ed.), vol. 1, p. 114 (1927). Hence conduct of the assured which enhances or merely varies the risk releases the underwriter. The law of suretyship is analogous.

In marine insurance, the doctrine rests on one or the other of two principles—either (1) that the ship has so far departed from the contemplated route that she is making a different voyage, one that the underwriter never agreed to insure, or (2) that the change in route has varied the risks insured against, so that again the underwriter is excused because he never agreed to insure those risks.

ARNOULD on *Marine Insurance* puts it thus (12th ed., 1939, s. 376, p. 539):

"In almost all voyages, as we have already seen, experience and usage have prescribed a certain course of navigation, as the safest, directest, and most expeditious mode of proceeding from one of the termini to the other. The course thus prescribed is the lawful course of the voyage insured: and, being a matter of general mercantile notoriety, is presumed to have been contemplated by the parties to the policy at the time of entering into their contract, and is, therefore, considered as much to form part of the policy, as though it were in express terms set forth therein.

"In every contract of insurance by a voyage policy, the meaning of the parties is, in law, taken to be that the assured shall enjoy the protection of the policy, only as long as he strictly pursues this regular course of the voyage insured, and carries it on to its termination with all safe, convenient, and practicable expedition. It is only upon this condition, never expressed, but universally implied, that the underwriter agrees to indemnify the assured; any failure, therefore, to comply with it, alters the nature of the risk which the underwriter has assumed, and frees him from liability for subsequent loss. This tacit understanding not to depart from the lawful course of the voyage insured is technically called an implied condition not to deviate.

"This implied condition extends as well to the time in which the voyage insured ought to be completed, as to the track or course of navigation by which it ought to be pursued. The understanding implied in the contract between the parties is not only that the ship, in sailing between the termini of the voyage insured, shall follow the course which custom has prescribed; but also that she shall commerce and complete the voyage with that reasonable expedition which the underwriter has a right to expect."

The reason is that the underwriter in setting his rate relies wholly on the truth of the representations of the assured. The opportunities for fraud being so great, the penalty for a breach of faith must be sharp. It is not thought to be sufficient to deal with the situation as a mere breach of contract; and still less so to treat it as a suspension of the contract while the deviation is going on. However, the rigor of the legal concept is greatly softened in practice by the use of "held covered" clauses, under which the assured may declare a deviation or change of risk and extend the policy accordingly upon payment of an additional premium.

As to marine insurance, the law was clarified and settled by the English Marine Insurance Act of 1906; 6 Edw. 7, C. 41 (reproduced in ARNOULD on *Marine Insurance,* 1939, 12th ed., sec. 376, p. 540), reading as follows:

"Section 46. * * *

"(2) There is a deviation from the voyage contemplated by the policy—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by policy, but the usual and customary course is departed from.

"(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

"Sect. 47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

"(2) Where the policy is to 'ports of discharge,' within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation."

This carefully chosen language, expressing the consensus of many minds, is much narrower than the language of legal authors writing

previous to the year 1906. Care must be exercised, in citing textbooks, to avoid editions which have not been revised since 1906; thus the editors of ARNOULD on *Marine Insurance,* it will be noticed, have eliminated the definition of deviation which appeared in the first edition of 1849 and in subsequent editions down to 1906, and have substituted the text of the Marine Insurance Act, 1906. The statements found in PHILLIPS on *Insurance* (1867), ch. xii, s. 977, KENT'S *Commentaries* (2nd ed., 1832), p. 315, and other older works long, and rightly, regarded as authoritative, must be read in the light of the superseding legislative action of 1906. It may be remarked that courts, since 1906, have not always observed this development.

Arnould's statement of 1849 was as follows:

"and a deviation, in the legal sense of that term, may be defined to be any unnecessary or unexcused departure from the usual course *or general mode* * of carrying on the voyage insured by which the risk is altered although the original terminus ad quem of the voyage insured is still kept in view." He cited in support EMERIGON (1783), BENECKE (1824), and KENT (1826).

WILLISTON & THOMPSON, writing in 1936 (*Contracts, Revised Edition*) repeat the italicized words without remarking that the editors of ARNOULD had abandoned them after enactment of the Act of 1906.

In marine insurance the doctrine has a long history. EMERIGON on *Insurance,* written in 1783 (see Meredith's translation, 1850) cites the Consolato, printed in Barcelona in 1494, the Hanseatic Laws of 1597, and the Ordinance of Wisbuy of the 13th Century. The U. S. Supreme Court laid down the doctrine as early as 1810, in *Oliver* vs. *Maryland Insurance Co.,* 11 U. S. 487.

In the law of transportation the history of deviation is much shorter. It began about 1795 in respect of charterparty disputes, such as the question whether a vessel performed her charterparty by going around the Windward and Leeward West Indian Islands downwind or upwind. CARVER cites cases on deviation as far back as 1793 but on examination, they were all cases of marine insurance. While the earliest bill of lading of which a copy survives dates from 1538, the general ship as we know it dates from the 19th century, and one of the first instances of the effort to transplant the deviation doctrine from marine insurance

* Emphasis supplied.

to common carriage appears to be the case of *Max* vs. *Roberts* (citations below), where J. T. shipped 10 hogsheads of sugar from Liverpool to Waterford in 1805 and as agent of the plaintiff insured the same for £375. The vessel proceeded via Point William Bay, where she was sunk by sea peril. The cargo underwriters refused to pay because J. T. stated to them that there would be a direct voyage. The plaintiff averred that it was the shipmaster's duty to proceed direct. This issue was never squarely reached because the plaintiff was found to have sued the wrong group of shipowners (1807), 2 Bos. & Pul. N. R. 455, 127 Eng. Repr. 706 (C. P.); the suit being started over again, it went off on a question whether a jury could find against some defendants and not against others, the counts being held defective (1810) 12 East. 88, 104 Eng. Repr. 36 (K. B.). The Court went on to say (p. 38):

"Neither is it alleged (which would have been further necessary) that defendants undertook to carry the goods directly to Waterford, because independently of any restraint on the shipowner arising from an agreement on the subject, the ship may make as many intermediate rests and stages in the course of the voyage as the ordinary convenience of its employers and the nature of its service require."

In *Parker* vs. *James* (1814), 4 Camp. 112, 171 Eng. Repr. 37 (K. B.), a ship and cargo on a voyage from Liverpool to Trieste in the year 1803 were captured. It was alleged that the ship had deviated "to chase prizes" and that as a result, the cargo owner had lost the benefit of his cargo insurance, for which he had paid premiums of £720 on a value of £4411. The Court awarded the cargo owner the cost value of the cargo and the shipping charges but not the insurance premium.

In these early cases it was alleged that as a result of deviation the cargo owner had lost the benefit of his cargo insurance, which he had placed upon a description of the voyage on the assumption that it would be either direct or customary. Presently the Courts were saying that it was immaterial whether the cargo owner insured his cargo or not, that being a private matter between himself and his underwriter. And thereafter the allegation as to the invalidating of the cargo insurance seems to have been dropped.

Sixteen years later, the Court of Common Pleas implied an undertaking to proceed direct and held the shipowner liable to a cargo owner for a loss while deviating. *Davis* vs. *Garrett* (1830), 6 Bing. 719, 130 Eng. Repr. 1456 (C. P.). The facts were that a barge lifted

a cargo of lime at Bewley Cliff in Kent for transportation to Regents Canal in Middlesex and proceeded via Whitstable Bay, where she delayed twenty-four hours. A storm arose and water wet the lime, causing it to heat so that the barge and cargo were consumed. The bill of lading contained exceptions of act of God, King's enemies, fire, and dangers, etc. of the seas. The Court, endeavoring to distinguish *Max* vs. *Roberts,* said:

"Deviation of the Master is undoubtedly a ground of action against the owner. We think the real answer is that no wrongdoer can be allowed to apportion or qualify his own wrong unless he can show that the loss would have happened anyway. We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course."

Two American cases announcing the view that the shipowner was liable directly to a cargo owner for a deviation were in the year 1839. In *Hand* vs. *Baynes* (1839), 4 Whart. 204 (Pa. Super. Ct.), goods were shipped in Philadelphia to be carried to Baltimore "via the Chesapeake & Delaware Canal"; the Canal being closed to repair the locks, the Master proceeded toward the Virginia Capes in order to go around the Delaware Peninsula, and ship and cargo were lost in a gale. The Master was held to have deviated and the shipowner was held liable for the value of the cargo.

Substantially to the same effect is *Crosby* vs. *Fitch* (1839), 12 Conn. 1410 (Sup. Ct. Err.), where a vessel bound from New York to Norwich could not proceed through Long Island Sound because of ice; the Master therefore went via Sandy Hook and the open sea toward Montauk Point and encountered a storm which required him to jettison the cargo. The Court said:

"We conclude that the question is not one of care or prudence but of misconduct or deviation on the part of the Master or owners * * *. It was such misconduct as would deprive them of the justification which they would have had if the same loss had been incurred in the prosecution of a voyage properly conducted. It was a deviation where the Master without reasonable necessity, either physical or moral, departed from the usual route of vessels between the ports of New York and New London, and of such deviation freighters (shippers of goods) as well as insurers, may take advantage. We have ever supposed

that upon given facts (whether there was a) deviation or not was a question of law; and so we find it treated in all cases."

In *Crosby* vs. *Fitch,* the cargo owner on learning of the deviation insured the new risk; the shipowner claimed the benefit of that insurance but the court denied his claim.

It will be noticed that all these early cases were geographical deviations.

Differences Between Insurance Policies and Bills of Lading, as Bearing on the Notion of Deviation.

In addressing the Association of Average Adjusters of the United States in 1932, John W. Griffin, Esq. as Chairman made the following remarks:

"It is to be remembered, at the outset, that the contract of marine insurance is one of a peculiar nature. As Cooley says (1 Insurance Briefs 114), there arises a fiduciary relation, and there must be full disclosure. The contract is one requiring the utmost good faith from both parties. Hence conduct on the part of the insured which increases or varies the risk, releases the underwriter, as in the analogous cases of suretyship.

"But these considerations do not apply to a contract of carriage. The parties there are in a relation of a wholly different kind from that of insurer and insured. In *Kish* vs. *Taylor* [1912] A. C. 604, 621, it was said:

> 'The fact that by a policy of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is therefore his right not to have these risks increased, differentiates, I think, altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brought safely and undamaged to the port of discharge.'

"And in the *Indrapura* (1909, DOre), 171 Fed. 929, 933:

> 'As applied to the relation of carrier and shipper, shorn of all obligations entailed by reason of insurance of cargo or freight, the term' (deviation) 'is not applied in so strict a sense.'

"That mere increase or variation in risk does not displace a contract of affreightment is perfectly clear. No case of increase of risk could be stronger than that of sailing in an unseaworthy condition; yet it is settled, by the highest courts, both of this country and of England, that

unseaworthiness on sailing is not a deviation (*Malcolm Baxter, Jr.*, 1928 A. M. C. 960, 277 U. S. 323; the *Turret Crown* [1922], 284 Fed. 439, 1924 A. M. C. 253, 297 Fed. 766 [2CCA]; *Kish* vs. *Taylor* [1912] A. C. 604).

"These authorities make it clear that, in the law of carriage, increase or variation of risk is not a deviation, in the sense that it destroys the contract of carriage and invalidates the bill of lading exceptions.

Definitions of Deviation.

Always mindful of the distinction between the insurance policy and the bill of lading, the following statements may be considered:

Constable vs. *National S. S. Co.* (1894), 154 U. S. 51, 66:

"In the law maritime, a deviation is defined as a voluntary departure without necessity or any reasonable cause from the regular and usual course of the ship insured."

The facts were that cargo was discharged on a substituted pier, and there destroyed by fire; the court held that there was no deviation.

Hostetter vs. *Park* (1890), 137 U. S. 30, 40:

"The same (insurance) doctrine is applicable in the case of a bill of lading, even though the usage (to touch and stay at a port out of the course) be not known to the particular shipper, if it be established as a general usage."

The facts were that a vessel descending the Ohio River moored its tow and moved up-stream one mile to pick up a cargo; this was not a deviation.

See also the *Maggie Hammond* (1869), 76 U. S. (9 Wall.) 435, at 444.

The Chester Valley (5CCA), 1940 A. M. C. 557:

"Deviation is such a serious departure from the contract of carriage as to amount to a different venture from that contemplated and, therefore, an abrogation of the contract."

The facts were that flour was tainted by odor; the court held that bad stowage was not a deviation, and found further that there had been no taint in the hold.

The definition of EMERIGON is commended by ARNOULD as "marked with all his usual terseness and perspicuity":

"Le navire change de route lorsqu', au lieu de suivre la voie usitée, il en prend une différente, sans perdre toutefois de vue l'endroit de sa destination." EMERIGON on *Insurance* (1783), vol. 2, c. xiii, s. 15, p. 94.

(Meredith's translation, 1850, p. 576:

"A vessel changes her route, when in place of following the customary way, or that allowed by her contract, she takes a different one, but still without losing sight of the place of her destination.")

ARNOULD on *Marine Insurance* has, since 1906, conformed his statement to the Act of 1906, as already stated.

WILLISTON & THOMPSON put the matter pragmatically. "The undertaking to begin and continue the voyage with reasonable despatch and without deviation is promissory in character. The owner (carrier) is * * * promising to do something in the future—something moreover which it is within his power to do. * * * What amounts to a deviation depends upon the stipulated or customary route between the ports in question, or upon the agreed mode or manner of carriage." (Revised Ed., 1936, sec. 1079). The final phrase ignores the effect of the Marine Insurance Act of 1906, so meticulously observed by the editors of ARNOULD. And the whole passage overlooks the Carriage of Goods by Sea Act of 1936, which would require the addition that what amounts to a deviation depends upon the reasonableness of the voyage performed.

Concerning these approaches, GRIFFIN, in the address already referred to, said: "But what legal theory underlies this? The doctrine of deviation is often explained on the ground that there is an implied warranty not to deviate. This explanation seems to me like lifting oneself by the bootstraps. We imply a warranty in order to explain deviation, and then we explain deviation by saying that there is an implied warranty. *Why* should a warranty be implied? There must be a reason back of that which is the real explanation." He then examined the theory of an implied warranty, in the following language:

"The word 'warranty' has two meanings:

"(1) A promise or undertaking forming part of a contract. It is in this sense that we speak of an implied warranty of seaworthiness. But this is *merely* a promise. Breach of a promise, such as the warranty of seaworthiness, does not make the ship an insurer or, indeed, give any right to the cargo, save that of recovering the damages directly

flowing from the breach. Bill of lading exceptions are not destroyed by a mere breach of contract. Even in case of the breach of a fundamental part of the contract, the ordinary legal consequence is merely liability for the damages which proximately result. There must be a causal connection between the breach and the loss. The principles of law applicable to breaches of such a warranty do not at all resemble those of deviation.

"(2) In its second sense, the word 'warranty' means, and this meaning is especially common in insurance contracts, a provision which is, in reality, a *condition* of the contract, non-compliance with which renders the contract void. Such warranties are, so far as I know, almost invariably *express* representations as to past or existing facts, or *express* limitations of the scope of the contract. Thus life insurance policies may be based on a warranty as to past condition of health. Automobile policies may have warranties as to the past record of accident or as to the use to which the car is to be put. Such warranties are rarely, if ever, implied, the single exception that occurs to me being the implied warranty of seaworthiness. The effect of breach of such a warranty is to render the contract void, leaving neither party any rights against the other; but the consequences of deviation go beyond this. The ship which has deviated is said, not merely to be unable to rely on clauses of special exception in the bill of lading, but to come under a liability greater than the common law liability of a carrier. For instance, a common carrier is not liable for loss of the goods by act of God, but a ship which has deviated is liable for loss by act of God, unless, as rarely happens, she can show that the same loss would have occurred anyway.

"The real explanation of deviation in the law of carriage seems to me to be, not any artificial doctrine of implied warranty or undertaking, but the fact that, when there is a deviation, the ship is on a different voyage from that for which the contract was made, and that, therefore, the contract has no application to that voyage. The ship, having taken the goods to an unauthorized place, is responsible for their safety. As was said in an English case (*Thorley* vs. *Orchis S. S. Co.* [1907], 1 K. B. 660):

> '* * * the shipowner who by deviating has voluntarily substituted another voyage for that contracted for in the bill of lading cannot claim the benefit of an exception contained in the special contract, which is only applicable to the voyage mentioned in that contract.'

It will be noted that such a departure from the contract has to do with the *physical location* of the cargo,—exactly what the word 'deviation' implies, 'going away from' the regular course. In this view, deviation is like a change of voyage,—that is, a change of destination,—which invalidates a voyage policy on the hull.

"In case of deviation, then, the voyage is changed with respect to the localities through which the ship is to pass. It therefore becomes a *different voyage*; and therefore one to which the contract of carriage has no application. The voyage contracted for is not being made,—it has disappeared from the picture,—hence the contract, made for that voyage only, does not govern the substituted voyage."

An understanding of the situation thus requires an examination of actual cases, grouped according to the character of the alleged departure from the proper course or mode of performance.

Voyage—Geographical Deviation.

To constitute deviation there must be a departure both from the geographical route, the customary route, and also from the contract route, if that differs from the customary route. There is no deviation if the ship does not go out of the ordinary or the contracted route, no matter how indirect such route may be. Prior to the 1936 Act, any deviation, no matter how reasonable, was a violation of the transportation contract. This harsh rule was not in accord with the general attitude, for the general test of the validity of any bill of lading clause is its reasonableness under all the circumstances. *Queen of the Pacific,* 180 U. S. 49; *Susquehanna,* 1924 A. M. C. 379; *Bombace* vs. *American Bauxite Co.,* 1930 A. M. C. 826, 39 F.(2d) 867; *Russo & Co.* vs. *U. S. Lines,* 1930 A. M. C. 899, 40 F.(2d) 39.

This general test had, however, not theretofore been applied by the American courts to voyage clauses; it had been said, on the contrary, that a departure from the strict terms of the voyage clause (or, if there is no voyage clause, from the shortest customary route) is a deviation, displacing much or all of the bill of lading, and permitting of no argument as to reasonableness.

The Act of 1936 applies the test of reasonableness to voyage clauses and deviations, as to other situations. Under the 1936 Act, it will always be a question whether any deviation is reasonable and hence excusable. The new Act therefore seems to have enlarged the rights of the carrier in this respect.

It has long been settled that custom permits a general ship to go back and forth between adjacent ports—such as New York and Philadelphia—once or oftener, in order to assemble a cargo for a transatlantic voyage. *Panola* (2CCA), 1925 A. M. C. 1173; *Blandon* (SDNY), 1923 A. M. C. 242, cited with approval in *West Aleta* (2CCA), 1928 A. M. C. 969 at 971. And a general ship on a voyage from New York to the Channel has been allowed to stop at Saint Johns, New Brunswick, for additional cargo. *Eastern Tempest* (SDNY), 1928 A. M. C. 70. A small vessel of coastwise type does not deviate by following a coastal route from New York to Haiti, instead of striking out directly across the open sea. *Yungay* (SDNY), 1932 A. M. C. 123. A freighter from the Far East to the U. S. Atlantic seaboard via Suez has been held to be within customary voyage limits when calling at London and at Continental ports not north of Hamburg. *Archer* (EDNY), 1928 A. M. C. 357. As these decisions are based on custom, the question whether the voyage was merely reasonable does not arise; hence the authority of these cases would seem to be undisturbed.

In the *West Aleta cases,* a general ship proceeding from Pacific Coast ports to Bristol, Rotterdam and Hamburg, was loaded so as to require discharge at Hamburg first; she stranded while entering Hamburg after having passed Bristol and Rotterdam without stopping. The courts held that this order of ports was not authorized either by the contract nor by custom; the court rejected the contention that the voyage clause should be given a broad (or reasonable) construction (2CCA), 1928 A. M. C. 969, at 972; see also (9CCA), 1926 A. M. C. 855. Under the Convention and the Acts, the reasonableness of what the *West Aleta* did would be open to discussion. Some of these claims were subsequently denied for other reasons (2CCA), 1935 A. M. C. 278.

In the *Willdomino case,* a general ship, having been detained at the Azores for repairs, resumed her voyage towards New York without purchasing extra coal; and the fact was that the master knew that he could not expect to reach New York direct on his available fuel supply unless he had good luck with the weather; his great circle course, however, gave him the option, after several days' steaming, of putting in at St. John, Newfoundland or Sydney, Cape Breton, for more fuel. As the voyage progressed, he found that he needed more coal, so he put into a bunker port, and stranded while passing along

the Nova Scotia coast in a fog. The lower courts condemned him for deviating, contrary to contract and custom; the Supreme Court condemned him for being of two minds, and uncertain at the time of sailing, and for pretending that he was bound for New York direct when he more than half thought he would stop for bunkers. The reasonableness of his action was not then open to argument; under the Convention and the Acts, it is submitted that it could be argued and might well alter the result. (3CCA), 1924 A. M. C. 889, 300 Fed. 5; affirmed, 1927 A. M. C. 129, 272 U. S. 718.

In the *Pelotas cases,* the vessel, on passage from Brazil to New Orleans, pursued a somewhat devious course through the West Indies, and stopped at La Guayra and Vera Cruz to discharge part of her cargo; she stranded at Vera Cruz and was condemned for deviating. It would seem that the same result would have been reached had the question of the reasonableness of her actions been open to discussion. (5CCA), 1933 A. M. C. 1188.

In the *Thordoc* (*Robin Hood Mills* vs. *Patterson S. S. Ltd.*), 1932 A. M. C. 811, a vessel laden with grain at Port Arthur proceeded upstream several miles to land some life boats, before proceeding towards Montreal; subsequently cargo was lost by negligent stranding. The Canadian court held that she had deviated; the Privy Council however questioned whether there had been an unreasonable deviation and in any event excused the vessel because she was back on her course when she stranded. (1937) 58 Lloyds L. R. 33. (Privy Council).

In the *Liberator* case, 1938 A. M. C. 141 (EDNY) it was held proper for an eastbound trans-Pacific freighter, en route from Japan to Panama, to stop at Honolulu for cargo and at San Diego for bunkers. In the *Plow City,* 1938 A. M. C. 1265 (EDPa), a deviation for repairs was excused. In the *Marianne,* 1938 A. M. C. 1327 (EDLa), testimony as to the custom of Gulf-West Indies voyages in 1931 was received and it was held that the vessel had called at ports within the custom and had not deviated. In the *Maui,* 1940 A. M. C. 1299 (9CCA), a harbor shift from one loading pier to another was held not a deviation.

In the *Hindanger case,* 1935 A. M. C. 563 (9CCA), a general ship trading between Seattle and Brazilian ports accepted a parcel of eggs which would have been safely carried if the vessel had proceeded direct in 35 days; but due to calls at ports along the way, the voyage occupied some 50 days, and the eggs spoiled; the vessel's movements were held to have been within the liberties clause, and there was no liability

for the loss. And in the *Tokuyo Maru,* 1926 A. M. C. 862 (9CCA), a vessel proceeding from Antofagasta and Iquique for Honolulu was held within her rights, according to custom and advertisement, in proceeding via Portland, Oregon.

The *Tregenna,* 1940 A. M. C. 1415 (SDNY) presented an unusual situation. Due to the failure of the charterer's agents to deliver a cablegram instructing the Master to proceed from Cuba to San Domingo for additional cargo, the Master, on finishing loading the cargo offered, started from Cuba for Europe via Norfolk for bunkers. When the error was discovered a day later, the charterer ordered the vessel by wireless to turn and go to San Domingo, where the vessel negligently stranded on the harbor bar, causing cargo loss and damage by trans-shipment. The trial court held that the vessel had deviated and was liable for the loss; but as the loss happened without privity, liability could be limited.

The first American case to consider the "reasonableness" of an alleged deviation under the Carriage of Goods by Sea Act of 1936 was the *San Guiseppe,* 1941 A. M. C. 315 (EDVa); the court held it to be reasonable, as well as customary, for a freighter bound from the Gulf for Gibraltar to call at Hampton Roads for bunkers. The court emphasized that the call was not for cargo handling purposes, and said that it was "persuaded that the statute (of 1936) did something more than merely declare the then existing law with regard to deviations. * * * The language of paragraph 4 of Section 4 would indicate that the only damage resulting from an unreasonable deviation which may be recovered is any loss resulting therefrom; that is, that the loss resulted from the deviation, and not from some other intervening cause."

Carrying cargo past the port of discharge is a deviation: *Niles-Bement-Pond Co.* vs. *D/S A/S Balto* (1922), 282 Fed. 235 (2CCA); if the package is small, the search for it earnest, and the importance of continuing the voyage preponderant, it would seem that the deviation would be excused.

A deviation—as putting into a port of refuge—because of a condition of unseaworthiness developing during the voyage which might have been prevented by "due diligence" to make the ship seaworthy before sailing does not nullify the bill of lading, as a voluntary deviation does. It would be inhuman to compel the entire ship's personnel

to risk their lives in an unseaworthy ship merely because some one person—perhaps a port official—had failed to use "due diligence"; it would be senseless to prolong a risk of loss of ship and cargo values when a port of refuge can be reached. *Malcolm Baxter, Jr.,* 277 U. S. 323, 1928 A. M. C. 960; *Ada,* 1926 A. M. C. 1, 241 N. Y. 197; *Turret Crown* (2CCA), 1924 A. M. C. 253.

The doctrine of voyage by stages exemplified by the *Willdomino* decision would not seem to have been altered by the Act. *Willdomino,* 300 Fed. 5, 1924 A. M. C. 889; affirmed on other grounds, 272 U. S. 718, 1927 A. M. C. 129. *Horaisan Maru* (2CCA), 1935 A. M. C. 96.

The American Act adds the following proviso, which is not found in any other Hague Rules text:

> "If the deviation is for the purpose of loading or unloading cargo or passengers, it shall, *prima facie,* be regarded as unreasonable." Section 4 (4).

This proviso is the fourth of the seven American amendments agreed to at the 1930 Chamber of Commerce Conference. It does not appear to be important. The *prima facie* presumption can be met and overcome by actual proof of reasonableness of any particular deviation to load or unload cargo and passengers. And on the principle that the mention of one class of deviations excludes others, it would seem to follow that a deviation for other purposes, as for example to take on fuel or stores, would not be called unreasonable. *San Guiseppe,* 1941 A. M. C. 315 (EDVa).

The general form of voyage clause recommended for the North Atlantic trade, and generally suitable for all trades, will be found in the Uniform North Atlantic Bill of Lading, at page 82.

Non-geographical or Breach of Contract "Deviations."

The various non-geographical situations to which the deviation rule has been extended by the courts, or which have been argued in reported cases, may be conveniently discussed seriatim: first, situations which are settled to be penalized "as for a deviation"; next, some border line cases; and lastly situations which have been decided not to be deviations at all.

Non-geographical Breaches of Contract Penalized as for a Deviation.

Deck stowage. It has become well settled that stowage of cargo on deck, when contrary to contract or custom of underdeck stowage, is

such a fundamental breach of the contract of carriage as to displace the contract clauses which might benefit the carrier, and constitutes the carrier an insurer of the safe arrival of the goods at destination. *St. Johns N. F. Shipping Corp.* vs. *S. A. Cia Geral do Rio de Janeiro,* 263 U. S. 119, 1923 A. M. 1131.

When a freight contract gives the carrier an option as to whether stowage shall be on deck or under deck, does the issuance of a clean bill of lading (with no exception stating that stowage is on deck) amount to a positive representation that the ship has exercised the option of underdeck stowage? In the *Peter Helms,* 1938 A. M. C. 1220 (WDWash) it was held that the shipper, in accepting such a bill of lading, consents to on-deck stowage without further notice. This view is supported by *Armour* vs. *Walford* [1921] 3 K. B. 473.

Towing. When a cargo-carrying vessel undertakes to tow another vessel, her speed is almost inevitably reduced; and the courts have held that, in the absence of contractual permission, cargo damage resulting from delay caused by towing another vessel is penalized "as for a deviation." *Globe Nav. Co.* vs. *Russ Lumber Co.* (1908), 167 Fed. 228 (NDCal); *The Scaramanga* vs. *Stamp* (1880), 5 C. P. D. 295 (C. A.). The rule of these cases is commonly obviated by standard bill of lading clauses giving permission "to tow and assist vessels in all situations, and to save or attempt to save life and property." Everyone is intensely interested in minimizing losses by encouraging acts of salvage, and underwriters approve such clauses. See the *Menominee and the Montana,* 1924 A. M. C. 501 (SDNY), affirmed 1924 A. M. C. 828 (2CCA).

Delay—Liability "as for a Deviation."

Delay, accurately speaking, is not deviation. Extreme delay, when negligent, is a breach of contract and the measure of damages is the difference between the arrived value of the merchandise and the value which the merchandise would have had at the time when a normal voyage would have been completed. *Iossifoglu,* 1929 A. M. C. 1157 (DMd); *Naiwa* (*U. S.* vs. *Middleton*), 1925 A. M. C. 85 (4CCA). In England, the ideas of deviation and delay were clearly differentiated by the terms of the Marine Insurance Act of 1906. Sections 46 (2) and (3) and 47 (1) and (2), already quoted, deal with deviation. Sections 42 and 48 deal with delay, in the following language:

"Sect. 42.—(1) Where the subject-matter is insured by a voyage policy 'at and from' or 'from' a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

"(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

"Sect. 48. In the case of a voyage policy, the adventure must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable."

This clear distinction between deviation and delay was intentional and deliberate, as is shown by the editors of ARNOULD on *Marine Insurance,* who state that "hitherto the word *deviation* has in legal language been used to include delay" citing cases in 1781 and 1873 "where it was held that delay was covered by a plea of deviation. * * * As the word *deviation* in its proper sense implies the idea of space or locality, it is an unhappy use of the term to make it cover delay, which refers to time; and there is no need for the fiction that an unjustifiable delay amounts to a deviation." (12th ed., 1939, sec. 376, p. 542, note l.).

WILLISTON and THOMPSON (Contracts, Revised Edition, 1936, Section 1079) nevertheless make this unhappy use of the term, saying that "So a deviation may arise from inexcusable delay." In support, they cite the old marine insurance case of *Oliver* vs. *Maryland Ins. Co.* (1810), 11 U. S. 487, whose authority would seem to be greatly weakened by the English Act of 1906 which destroyed the authority of its English counterparts. They also cite the *Hermosa,* 1932 A. M. C. 541, 57 F.(2d) 20 (9CCA), a modern instance which, it is submitted, is not accurately reasoned; the facts were that a vessel chartered for a full cargo of perishable vegetables, with a warranty of "immediate despatch at full economical speed" was delayed 27 hours in sailing by the drunkenness of the Master, and further delayed by breakdown of the refrigerator plant, so that the cargo spoiled. Adequate basis for full liability is found in the breach of warranty. The holding that the delay was a deviation went quite beyond the necessities of the situation.

As the subject is transplanted from the field of marine insurance to that of transportation, it would seem proper to consider that the legislative statements of the Marine Insurance Act of 1906 ought to be applied as well to transportation delay cases.

The sounder basis of liability for delay is the commercial frustration of the venture through the carrier's unexcused negligence. An ocean carrier never warrants that a schedule will be kept, or a market reached on or before a particular time, unless there is a specific clause to such effect, which is unusual. The perils of the seas, the restraints of princes, threats of war and war itself, breakdowns due to latent defects not discoverable by due diligence, strikes, and similar causes may all delay the voyage or frustrate the commercial purpose of the movement of cargo without liability on the part of ship or carrier.

In any trade, there is a provable bracket between the swiftest and the slowest voyage of vessels of the class employed. Delay is not actionable unless the customary slowest voyage performance is exceeded negligently. Thus in the sugar trade between the Philippines and North of Hatteras via Panama, freighters of the usual class performed the voyage in 46 to 66 days; and a vessel which took 116 days or 50 days more than the customary maximum was held liable for decline in market price occurring during such 50 days, which were lost because of a foul bottom (27 days) and engine breakdowns (23 days). *The Iossifoglu,* 1929 A. M. C. 1157 (DMd). Damages for improper delay are measured by the difference between the market value at the time when the goods should have arrived, and their market value on actual arrival. *The Naiwa* (*U. S.* vs. *Middleton*) (4CCA), 1925 A. M. C. 85, an opinion by Judge Rose, and discussed by Judge Soper in *The Iossifoglu, supra,* at page 1162.

In the *Citta di Messina* (1909), 169 Fed 472 (SDNY), a fruit carrier from Spain to New York was held liable because the fruit spoiled, due to the vessel waiting at the loading ports in the hope of getting more cargo. In the *Hindanger case,* 1935 A. M. C. 563 (9CCA), eggs spoiled during a 50 day passage from San Francisco to Brazilian ports, and it was shown that they would have arrived in good order if the vessel had proceeded direct in 35 days, instead of calling at cargo ports along the route; there was, however, no contract for a direct passage with the eggs, which formed only a portion of the general cargo, and the court did not imply any promise to proceed direct in view of the known nature of the eggs.

Delay due to political actions and to war is not actionable. The past decade has seen many remarkable alterations in trade routes because of political considerations, threats of war and war itself. The invasion of the Yang-Tse valley by Japan, that of Ethiopia by Italy in 1936, the Spanish Civil War in 1937-1938, and the general European wars commencing in 1939 have caused commerce to seek new routes which, while longer, were safer; in particular, the Suez Canal route between Europe and the Far East has repeatedly been abandoned in favor of the Cape route, causing long delays. It is noteworthy that there has been practically no litigation as a result.*

Before the opening of the Suez and Panama Canals, in 1869 and 1915 respectively, there were hemisphere voyages where it was indifferent, as a matter of mileage whether the vessel proceeded via the Cape or the Horn. After these canals were put in operation, the number of such situations greatly increased. Charts have been prepared and may be found in marine atlases such as Phillips' showing the zones and boundary lines affected by these altered conditions. When the mileage is equivalent, the vessel may proceed by either route; and is not liable if it turns out that the other route might, under developing circumstances, have been faster.

The editors of Carver on *Carriage of Goods by Sea* have been exceedingly careful to distinguish between delay and deviation. Throughout the text of Chapter X, wherein "Proceeding on the Voyage" is discussed, they speak of "delay *or* deviation."

The distinction between deviation and delay is pointed by two old American cases cited by Carver, Section 290. In *Hand* vs. *Baynes* (1839), 4 Whart. 204 (PaSupCt), it was held that the master ought to have remained in a place of safety until the Canal was re-opened or else have returned to Philadelphia, the voyage being frustrated. In *Crosby* vs. *Fitch* (1839), 12 Conn. 410 (SupCtErrors), it was held that the master should have waited until the ice barrier cleared away, or else regarded the voyage as frustrated.

* A neutral vessel proceeding from Australia to England via Cape Town, and at Dakar for bunkers when war broke out in September 1939 was held to have breached her charter by refusing to proceed without a convoy. *Westralian Farmers, Ltd.* vs. *D. S. Orient* (1940), 65 Lloyds L. R. 105.

Deviation—Some Border Line Situations.

Drydocking with Cargo on Board. Placing a vessel on drydock with cargo in the holds has been judicially condemned; it has been suggested that it is a deviation. It is supposed to vary the risk, and delay the transit of the goods. Modern steel vessels may however be safely drydocked with substantial weights in the holds, which was not true of wooden and iron hulls. Scraping grass and barnacles and painting the hull is also a rapid operation, and results in faster and more satisfactory voyages. The two leading drydock cases concern the *Indrapura,* whose voyage was performed in 1902. The vessel had a fire while in drydock at Hongkong for routine cleaning and painting, "without maritime necessity" (i. e., not for refuge) and two lots of cargo were damaged. Each lot sued separately, although in the same court. The first case, obviously upon inadequate presentation of evidence, resulted in condemnation of the ship for unjustified deviation by drydocking with cargo aboard. (1909), 171 Fed. 929 (DOre). (This opinion contained the much-quoted language about taking a tug as a deviation.) The second trial had the opposite result; the same court found from the evidence that drydocking with cargo was customary in the trade, (1916), 238 Fed. 853 (DOre), and said: "From all this testimony I am firmly persuaded that in November 1902 and for many years prior thereto, a general usage and custom existed and pervailed at Hong Kong for vessels to go on dry dock with partial cargo for survey and for cleaning and painting hulls and for ascertaining whether they were seaworthy to enter upon further voyages." The court did not refer to its earlier opinion, either to distinguish or overrule it, and said nothing at all about the analogy of taking a tow on which it had relied in the opinion of seven years before.

Further disputes about drydocking as a possible deviation have for many years been eliminated by the inclusion in all bills of lading of suitable permissive words. These are usually placed in the "scope of the voyage" clause, and are variously phrased. The Uniform North Atlantic bill of lading uses the following language:

"The ship * * * may, either with or without the goods on board, and before or after proceeding towards the port of discharge, drydock, go on ways or to repair yards * * * and all of the foregoing are included in the contract voyage."

Such provisions are satisfactory to underwriters and it is many years since a loss, other than by fire, has been caused by drydocking with cargo. The operation should in every instance be approved by surveyors.

Hiring or Accepting a Tow from Another Vessel. Is it a deviation for a vessel supposed to possess independent power of locomotion to hire another vessel to tow it? Plainly a non-self-propelled vessel may hire a tug; it can proceed in no other way. And there seem to be no cases complaining that sailing vessels have hired tugs to assist them in rivers and estuaries, although there have been controversies as to whether the tugs should be paid by charterers or owners. *Skomvaer,* 1923 A. M. C. 15 (SDNY); *Christianssand Shipbldg. Co.* vs. *Marshall,* 1927 A. M. C. 1707 (EDPa). Steamers are frequently shifted in port from one loading or discharging place to another by means of tugboats, without raising steam on their main boilers, and no litigated case seems to have questioned this general and economical practice. A tow from one port to another was, however, questioned in the case of the *Pinellas,* 1929 A. M. C. 1301 (EDSoCar), affirmed on other grounds, 1930 A. M. C. 1875 (4CCA); concerning that case, Mr. Griffin, in his address already referred to, said:

"Some cases have referred to being towed as a deviation, but I know of no case arising between ship and cargo which has ever actually decided it to be so. Obviously a disabled ship, which is towed or otherwise assisted by tugs, does not thereby deviate. The only case which has indicated that being towed may constitute a deviation is the *Pinellas,* 1929 A. M. C. 1301 (EDSoCar). There the ship was to start her loading at Savannah and to complete it at Charleston. Owing to a strike among her engineers, she was towed from Savannah to Charleston instead of proceeding under her own power. After she had arrived at Charleston, she took on fuel oil and, in consequence of some neglect in so doing, caught fire and the cargo was damaged. The District Court held that the shipowner was liable because the ship had not been properly constructed or competently manned; that the fire had resulted from those faults; and that, since the faults were found to constitute neglect of the owner, the owner could not defend under the fire statute. That disposed of the case. But the District Court went on to say, purely by way of dictum, that the ship had been guilty of a deviation when she allowed herself to be towed. The authority for that proposition was said to be the *Indrapura* (1909, DOre), 171 Fed. 929, which was a case of fire in drydock, and had nothing to do with towage. In the course of the *Indrapura* opinion, the Court said:

'So for like reasons towing, or being towed, was added to the list of acts to which is properly imputable an element of risk not contemplated by the contract and therefore constituting a deviation.'

But in not one of the cases referred to by the Court in support of this statement was it held that to be towed was a deviation under a contract of carriage. The Court in the *Indrapura* went out of its way to make a broad statement which had no bearing on the question before it and which was not supported by any authority. The Court in the *Pinellas* cited that statement as evidence of settled law. It was a case of the blind leading the blind.

"When the *Pinellas* case was appealed, the Circuit Court of Appeals (1930 A. M. C. 1875) affirmed on the ground that the fire was due to neglect of the shipowner, and, quite properly, did not enter into the subject of deviation at all. The *Pinellas* is, therefore, of very little weight as a deviation authority.

"But let us consider the facts of that case for what they are. A steamer, intended to sail as such under her own power, starts her voyage, deliberately and without excuse, in tow, and thus proceeds from Savannah to Charleston. If the cargo is destroyed by lightning two weeks later, while the ship is going up the English Channel, is she liable because she proceeded in tow between Savannah and Charleston?

"It seems hardly probable that, if such a question was presented for authoritative decision, it would be held to be a deviation. It might be said that it would be a deviation to put cargo contracted to be carried by a steam vessel on a sailing vessel to be carried by sail or on a barge to be conveyed by towage. Perhaps there is an analogy between placing cargo on a sail-boat, and keeping it on the steamer, but sending the steamer out under sail; or between placing the cargo on a barge to be towed, and keeping it one the steamer, but having the steamer towed. If the lower court's dicta in the *Pinellas* can be supported at all, it must be on some such analogy. But, however enticing the analogy, it is not, as it seems to me, a case of deviation."

Taking a tow, like drydocking, has been eliminated as a source of controversy by the insertion of a suitable permissive clause in each bill of lading; the language in the Uniform North Atlantic bill of lading reads as follows:

"the ship * * * may, either with or without the goods on board, and before or after proceeding towards the port of discharge, * * * tow and be towed * * * and all of the foregoing are included in the contract voyage."

Trans-shipment without "Maritime Necessity." In *Haiti* (5CCA), 1937 A. M. C. 554, it was said that an agreement to transship cargo at Panama to the United Fruit Company, "might be a deviation" (p. 557).

Forwarding Shut-Out Merchandise on the Next Following Steamer.

In busy seasons, it is not always possible to book cargo so accurately as to assure the loading of each lot into the named steamer. It is therefore permissible to forward shut-out goods on a following steamer, but this must be done without unreasonable delay: *Newburgh,* 1927 A. M. C. 1646 (6CCA).

Non-geographical Situations which are Not Deviations.

Abandonment of the venture is in a category by itself; when there is a deviation, the final terminus is always kept in view; when there is abandonment, the final terminus is given up. Closely related to abandonment is *frustration*; the enterprise can no longer be carried forward. *Barratry* is a crime committed by master and crew; it is not a deviation by ship or carrier. A *change of master,* while sometimes a cause for cancelling hull insurance policies, is no reason for invalidating the bills of lading; the era has long passed away when owners of merchandise entrusted them to a particular ship master. *Saving life,* or attempting to save it, is not a deviation. *Property salvage,* while held to be a deviation by the cases (all of which are now fairly old, and ante-date the present era of steel, steam and radio) is universally permitted by contract clauses and is broadly encouraged; it is not, however, a duty. *Bad stowage* is not a deviation: *Chester Valley,* 1940 A. M. C. 555 (5CCA). *Failure to use due diligence* to make the the vessel seaworthy is not a deviation: *Malcolm Baxter,* 1928 A. M. C. 960, 277 U. S. 323; *Eastern Glade,* 1937 A. M. C. 339 (2CCA); *Kish* vs. *Taylor* [1912] A. C. 604. Mere *non-delivery of cargo* is not a deviation: *Shackman* vs. *Cunard,* 1940 A. M. C. 971 (SDNY).

Deviation—Waiver or Estoppel.

In marine insurance, the release of a policy by reason of deviation may certainly be waived in writing, and an underwriter may under some circumstances be estopped to plead the deviation. In England

it is held that a charterer who knows that a vessel has deviated with his cargo but continues to give orders as to the vessel's movements thereby waives the deviation: *Hain S. S. Co., Ltd.* vs. *Tate & Lyle, Ltd.* (*The Tregenna*), (1936) 55 Lloyds L. R. 159; 155 L. T. 177; 41 Com. Cas. 350 (H. L.). An American court subsequently refused to follow that rule in the same disaster: *The Tregenna,* 1940 A. M. C. 1415 (SDNY). Such a divergence of principle in this field seems undesirable, and the result of an appeal is awaited.

Limitation of Liability—The $500 Valuation Clause—Freight for Excess Value.

The liberty hitherto enjoyed by carriers to agree to any reasonable limit of liability for value of cargo has now been restricted as to the amount, but not altered in principle. An agreement of less than $500 per package or other freight unit is no longer valid, and will be read as though the agreed amount were $500. Section 4 (5). The principle stated in the cases,† that an agreement as to the value of the goods does not "weaken, lessen or avoid" the carrier's liability contrary to the Harter Act, Sections 1 and 2, has accordingly been given the added sanction of statute.

In *Studebaker Distributors, Inc.* vs. *Charlton S. N. Co.* (1937), 59 Lloyds L. R. 23 (K. B.), it was held that an unboxed motor car was not a "package," and hence an agreement that "the value of each package shipped does not exceed $250" was ineffective. This decision could hardly be reached under the Convention, as a motor car is certainly a "unit" if not a "package." The voyage was from Norfolk, Va. to London in 1935, and not governed by the Convention.

In *Shackman vs. Cunard White Star,* 1940 A. M. C. 971 (SDNY) the Court considered a clause that, in event of short delivery, "the price should be the market price at port of destination." Two cases of furs, shipped without declaration of excess value, were short on delivery and their market price at port of destination was $18,000. The Court read the statutory maximum of $500. per package into the price clause and limited recovery to $1,000.

Freight for Excess Value. A declaration of excess value must be accompanied by a statement of the nature of the goods. A declaration of excess value need not be a declaration of all the excess value. In other words, a shipper of machinery worth $10,000 or a work of art of indefinite value may declare any desired excess value. However, he cannot recover more than the proved value. Sec. 4, (5), sentence 4.

† *Calderon* vs. *Atlas S. S. Co.* (1898), 170 U. S. 272; *Reid* vs. *Fargo* (1916), 241 U. S. 544; *Union Pacific R. R.* vs. *Burke* (1921), 255 U. S. 317.

Value or Nature Misstated.

If any declaration of either the value or nature of goods is "knowingly and fraudulently misstated," the ship is free of all responsibility no matter how the goods are lost or damaged. Section 4 (5), last sentence.

The word "fraudulently" in the American Act does not occur in the Convention nor in any other Act. An understatement of value may lull the carrier into taking less precaution in watching the cargo than the carrier would take if the true value were known; this might be considered a fraud on the carrier, who is deceived by the understatement into assigning fewer watchmen than are necessary to fight off assailing thieves who know the full value of the goods.

False Billing. Another form of discrimination is false billing. This was expressly forbidden by the False Billing Act of June 16, 1936, an amendment to the Shipping Act of 1916, Section 16, 1936 A. M. C. 1467. That Act makes it unlawful "to obtain transportation by water of property at less than the rates that would otherwise be applicable" by means of false billing, false classification, false weighing, false report of weight, nor any other unjust or unfair device or means." The penalty is a fine of not more than $5,000. The text of this Act is printed in Appendix G. Investigations of such practices have been carried on by the Maritime Commission in the Philippine and Japan trades; see Rates of Carriers in Japanese Trades, 1940 A. M. C. 1645 (Mar. Com.); and have been penalized: 1941 A. M. C. 545.

Notice of Loss and Claim for Damages.

The Convention and the Act have wholly swept away the old doctrines concerning the nature of agreements as to notice of loss and claim for damages. The party plaintiff need no longer allege or prove, as a condition precedent to maintaining his action, that he complied with notice and claims clauses or that he was unable to do so, or that the carrier waived compliance, or lost the right to insist on

compliance by reason of a deviation. *The Southern Cross,* 1940 A. M. C. 59 (SDNY); *Lindgren* vs. *Farley,* 1938 A. M. C. 805 (SDNY). An action for cargo loss or damage may now be commenced *at any time within one year* after "delivery of the goods or the date when the goods should have been delivered," *and not thereafter,* and may be maintained regardless of the fact that no notice whatsoever, and no claim, has ever been filed. A party plaintiff who has not given notice at the time of accepting the goods (if the damage is visible upon inspection) or within three days thereafter (if the loss is concealed) in accordance with Section 3 (6), merely has to bear the additional burden of showing that the loss of which he complains did not occur after the goods left the possession of the carrier; i. e. he must overcome the *prima facie* defence made out by the simple fact of removal of the goods into the custody of the person entitled to delivery thereof, without prompt record of bad order.

The American Act contains an added proviso, which is not found in any other Hague Rules text, intended to clarify the foregoing. This was the third of the six American amendments agreed to at the 1930 Chamber of Commerce Conference. It provides, in addition to the text of the Rules, that

> "if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

It seems evident that this language does not alter the sense of the text of the Hague Rules; it merely reiterates in another form the rule already laid down. Curiously, the proviso seems limited to the rights of *shippers,* and might strictly be construed not to give any rights to consignees, representatives, or subrogated parties; whereas the Hague Rules phraseology is broader. As the Act contains both phrases, it would seem to be as broad as the broader of the two forms of words.

The American Act also contains another unique provision as to notice, as follows:

> "Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof."

This was the fourth American amendment agreed upon at the 1930 Chamber of Commerce Conference.

The purpose of this amendment was to reverse the line of cases of which *Anchor Line* vs. *Jackson* [1926 A. M. C. 221, 9 F.(2d) 543 (2CCA)] is the last; that case reviews the state of the law in detail, and holds that a notice of loss or damage endorsed on the delivery receipt is insufficient and does not comply with a bill of lading clause requiring notice to be given. These cases are therefore of no further authority as precedents in respect of ocean bills of lading in foreign commerce, although they retain some authority in such domestic trade as may hereafter be conducted under the Harter Act. It would seem likely, however, that the courts will feel that the rule of public policy expressed by Congress in enacting this provision of the Carriage of Goods by Sea Act will warrant a reconsideration of the doctrine of *Anchor Line* vs. *Jackson,* and perhaps justify an abandonment of that rule and an adoption of the rule of the Act for all purposes.

The mere giving of notice upon removal of the goods, or within three days, does not relieve the party plaintiff on behalf of the lost or damaged cargo from the duty of proving the loss or damage; nor does the omission of notice appear to increase the burden on the party plaintiff, except as above mentioned.

As stated by Temperley and Vaughan (4th edition) at page 41: "it is desirable, for safety's sake, that owners of goods and those acting for them should, nevertheless, carefully peruse Section 3 (6), and take timely action in accordance therewith, as far as circumstances will permit, in case of loss or damage." Prompt notice certainly facilitates the handling of claims.

Time for Suit.

The one-year time for suit clause is of the greatest importance. The suit must be brought within one year, even if the carrier has failed to use due diligence to make the ship seaworthy and so has caused damage to the cargo. Mere failure to use due diligence does not forfeit the benefit of the one-year suit clause. In the *Carso case,* 1937 A. M. C. 1078 (2CCA), even the wrongful issue of a clean bill of lading for cargo obviously in bad order did not estop the carrier from successfully invoking a one-year Hague Rules time for suit clause in the bill of lading contract.

It is important to observe that the time for suit under the Carriage of Goods by Sea Act is one year from the date when the goods were delivered, or should have been delivered, by the ship or carrier to the

consignees or receiver; whereas the time for suit under the Interstate Commerce Act governing railway bills of lading is two years from the date when the carrier finally rejects the claim.

A clause limiting time to less than one year will simply be given effect as though it provided for one year: *Buxton* vs. *The Argentino*, 1939 A. M. C. 815 (SDNY). Also the one-year limit may be waived, expressly or on principles of estoppel: *Buxton* vs. *The Argentino*, 1939 A. M. C. 815 (SDNY). A waiver may not, of course, be effected in order to give one shipper an advantage over another.

It should be borne in mind that in coastwise trades conducted under the Harter Act, the bill of lading may still agree, as heretofore, to any reasonable short time limit upon the right to sue. The extension of the powers of the Interstate Commerce Commission as a regulator of coastwise trade, under the Interstate Commerce Act, Part III, of Sept. 18, 1940, 54 U. S. Stat. at L. 929, 49 U. S. Code 901, would not appear to alter that proposition.

Can any event stop the running of the one-year limit? The Convention and Act are silent as to suspension of the running of the one-year limit upon the right to sue. No suspension of the time is granted. The time limit being statutory, it is absolute in the terms of the statute.

Arbitration.

The Convention and the Acts do not mention arbitration as an alternate to litigation; they speak only of lawsuits. However, agreements to arbitrate maritime disputes are enforcible by legal proceedings, both under the Federal Arbitration Act of 1925 and many State statutes, such as the New York Arbitration Law. The cases mentioned on page 174 should be noted.

While it would have been more satisfactory if the Acts had mentioned enforcible arbitrations, there would seem little doubt that arbitration agreements are valid, and that the notice clauses, the time for suit clause, and all other provisions of the Acts which might be applied to an arbitration, govern arbitration agreements as they do lawsuits.

An arbitration clause in a charter party will not be deemed to apply to a bill of lading issued under the charter, unless specifically incorporated. *Thrasyvolous*, 1939 A. M. C. 867 (SDNY); *Harmatris*, 1940 A. M. C. 797 (SDNY).

Adjustment of Loss Claims on Invoice Values.

It has long been settled that the bill of lading may, upon an appropriate statement of consideration in the adjusted rate of freight, provide that loss claims shall be adjusted on the basis of the invoice value of the merchandise, instead of on the market price at the port of destination on the date of arrival or on the date when the cargo should have arrived which, in the absence of an agreement, is the rule of damages applied in the admiralty and common law courts.† There was nothing in the Harter Act to regulate or forbid this basis of loss adjustment, which has obvious advantages in simplicity and puts an end to speculation as to whether the market will go up or down during the voyage. Likewise there seems to be nothing in the Carriage of Goods Acts to prevent the continuance of this practice. It is thought that *The Merauke* and *Kilthau* vs. *I. M. M.* still represent the law on this point; indeed, the Supreme Court, in a leading case arising prior to the 1936 Act, under the Harter Act has stated unequivocally that a "true invoice value clause" is fair and valid. *The Ferncliff*, 1939 A. M. C. 403, 306 U. S. 444. Such a clause would read:

"All claims for which ship or carrier may be liable shall be adjusted and settled on the net invoice cost plus disbursements."

Such a clause merely substitutes the invoice value of the cargo at the port of shipment for the market value at the port of destination, as the measure of sound value against which damaged value is compared. The great advantage of the invoice is its certainty and ease of proof. Every article in foreign trade necessarily has an invoice, which no amount of ingenuity in market research or forensic argument can alter. When the basis of damages is the invoice plus the disbursements (or freight and insurance), the cargo owner foregoes the speculative expectation that the goods are being moved from a lower to a higher market area, and the carrier foregoes the converse speculative possibility that the goods are being carried to an area where the market value will turn out to be depressed. This is fair, and comports with public policy.

If the disparity between the invoice value and the market value at destination happens to be very large, it may result that, under the

† *Merauke*, 1929 A. M. C. 596, 31 F.(2d) 974 (2CCA). *Kilthau* vs. *I. M. M. Co.*, 1927 A. M. C. 1131, 245 N. Y. 361 (CA).

Ferncliff rule, no damages are assessable for a damage which has actually been suffered and for which there is liability. Suppose, for example, a manufactured article invoiced at $400. and damaged to the extent of $100. Due to war, or famine, or some other business condition, the damaged article can be sold at the place of destination for more than $400.; the goods owner has realized his invoice value and no damages can be proved against the carrier. On the other hand, the same rule may impose heavy damages on the carrier if the goods owner chances to ship a cargo to a glutted market. Suppose a sugar cargo moving from the Far East to the North Atlantic Coast and invoiced at say 25 cents a pound; during the voyage the market breaks—as it once did—to 5 cents a pound; and the cargo is lost under circumstances of legal liability. The cargo owner is here in effect guaranteed against decline of market.

It should be noted that the invoice value clause was forbidden in railway traffic by the Cummins Amendment to the Interstate Commerce Act of March 4, 1915, c. 176, 38 U. S. Stat. at L. 1196; 49 U. S. Code 20 (11). See *Union Pacific R.* vs. *Burke,* (1922) 255 U. S. 317, 322.

Adjustment of Partial Losses Pro Rata.

Under a *pro rata* clause, a 50% damage to a package carried on an agreed valuation of $500 is settled by the payment of $250.* Such clauses were valid under the Harter Act; and there is nothing to indicate that their validity has been in any way impaired by the Carriage of Goods by Sea Act.

The *Ferncliff* invoice value rule and the *pro rata* clause, taken together, produce an odd dilemma for the draftsman, so long as we lack definite assurance that the *Ferncliff* rule will be applied to Carriage of Goods by Sea Act cases. Assuming that the *Ferncliff* applies after 1936 as before that year, a *pro rata* clause might better be omitted, as its presence might place liability on the carrier which the *Ferncliff* rule would avoid; but if the *Ferncliff* should be held inapplicable to Carriage of Goods Act cases, then the *pro rata* clause would be of great importance in reducing the sums for which the carriers might otherwise be liable.

* *Atlantic Motor Freight Co.* vs. *Elliott Hosiery Co.*, 1935 A. M. C. 628, (App. Term), 278 N. Y. S. 518. See *Bingham* vs. *Osaka*, 1935 A. M. C. 1103 (SDNY) dictum by BONDY, J.

Limitation of Recovery to Actual Loss.

One of the American amendments agreed to at the 1930 Chamber of Commerce Conference is now the fourth sentence of Section 4(5), as follows:

> "In no event shall the carrier be liable for more than the amount of damage actually sustained."

This clause was deemed desirable in order to prevent a carrier having to pay a loss on agreed value if the actual value of the merchandise is less. Thus if a bale of cotton of an actual value of say $50, but declared to be worth $100, should be lost, the carrier will not pay more than $50. The fact that the matter was debated, and the proviso adopted, indicates that there was an evil here requiring correction.

The Anti-Trust Acts.

Congress has not neglected the occasion to reaffirm the laws against discrimination as between one shipper and another, and Section 9 of the 1936 Act accordingly provides that carriers who desire to waive some of their "rights and immunities" or accept an increase of their "responsibilities and liabilities" may not thus differentiate between competing shippers. Any advantage of this sort, offered by a carrier to any shipper, must likewise be offered to all competing shippers similarly situated. Thus for example a carrier who offers to carry the automobiles of one shipper on the basis of a general agreed value for $1,000 per car, instead of $500, without increase of the rate, must accept from the competing public all automobiles offered on the same $1,000 value basis and at the standard rate. See *Hernandez* vs. *Bernstein et al.*, 1941 A. M. C. 218 (2CCA).

General Average clauses, otherwise lawful, are not forbidden or regulated by the Convention and the Acts. Section 5. The existing body of law relating to General Average is therefore not disturbed. The recommended General Average clauses are reproduced in Appendix B.

General Average liens on imported merchandise must be reported to the Collector of Customs in order to prevent his releasing the cargo free of lien. See U. S. Code Title 19, section 465 (page 28, *supra*).

Special Cargoes.

The scope of Section 6 has never been discussed by the courts; it would seem that cargoes destined for polar expeditions, for cable-laying

work, for hospitals on distant shores to which commercial vessels do not go, for aviation stations on remote islands, and the like, would come within its purview. In England, Canada, and Newfoundland, coasting trades are permitted to avoid compliance with the Acts by the device of permitting them to carry all kinds of cargo under Section 6, which is the method sanctioned by the Protocol of the Convention (text of protocol, p. 65).

Limitation of Ship-Owner's Liability.

The Convention and the Acts do not make any change in the existing law of this subject—Section 8. A separate Convention on this subject was adopted simultaneously with the Bill of Lading Convention and is now the law in many countries: Belgium, Norway, Finland, Brazil, Denmark, Netherlands, Portugal, Spain, Sweden, France, Poland, Italy. The British statute prevails throughout the British Empire; the version which is the law in Canada is reproduced herewith, in Appendix D.

The American law has recently been extensively amended but is still unlike the law of any other country, resisting the trend towards the uniform Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Shipowners signed at Brussels on August 25, 1924. The present American text is reproduced in Appendix C. A discussion of the entire matter, however, is beyond the purview of this book. See BENEDICT on *Admiralty* (6th Edition, Knauth, 1940) volume 3, sections 474-544.

The Gold Clause.

The Convention provides, in Article 9, that the monetary unit which it mentions shall be taken to be gold value and converted into national currencies in round figures. This refers, of course, particularly to the £100 Sterling valuation clause, Article 4 (5). The British, Indian and Australian Acts, passed in 1924 under the gold standard laws, all refer to £100, without reference to gold or any particular kind of money. The Belgian Act, passed in 1929, under gold standard laws, provides that the £100 valuation clause shall be expressed in Belgium as either 3,500 belgas or 17,500 francs. The Newfoundland Act of 1932 refers to $500 gold.

But in the United States and Canada, the gold standard laws had been modified prior to the enactment of the Hague Rules. Congress therefore deemed it proper to eliminate Section 9 from the pending

Bill, and to declare, in Section 4 (5), that the valuation should be $500 "lawful money of the United States." The Canadian Parliament did the same; it declared a valuation clause of $500, Article 4 (5), in "lawful money of Canada," Article 9. As long as the pound Sterling and United States and Canadian dollars remain at the familiar approximate parity of five dollars to the pound, the substitution of "lawful money" for gold parity equivalents may not cause much difficulty in practice.

The French Act, however, suggests that a substantial lack of uniformity may occur in time, which may have an important effect upon the place chosen for cargo damage litigation. When France enacted the Rules in 1936, the equivalent of £100 was taken at 8,000 French francs, which was then the equivalent at par. But the value of the franc has already changed; and 8,000 francs is no longer the commercial equivalent of either £100 or $500. The serious effects of these disparities has been pointed out to the International Maritime Committee by a Scandinavian member, and a study of the subject will be undertaken. Lacking the gold clause, Article IX, the other countries cannot call upon a devaluing country to honor its treaty obligation by amending its value clause so as to recognize the new basis of value. This seems a misfortune.

Power to Suspend the Operation of the Act.

Section 14 gives to the President power to suspend the operation of all or any part of the Rules, which are comprised in Title I of the Act, if the foreign commerce of the United States, in competition with that of foreign countries, should be prejudiced by the operation of the Rules. It is difficult to imagine circumstances which would require or justify a suspension of this Act. It would seem unlikely that the President will ever make use of this power, unless the whole movement for bill of lading uniformity in international trade should break down. A few countries have been curiously reluctant to put the Hague Rules Convention into effect; and Section 14 serves notice that if the continued lack of uniformity should prove disadvantageous for American commerce, the means of retaliation are ready to hand.

A suspension on ten days' notice would plainly be a violation of Article XV of the Convention, which agrees that a denunciation shall take effect only after one year, and would justify a complaint by any other ratifying State. On the other hand, a non-ratifying State would seem to have no possible right or standing to object if the United

States should alter its laws as to bills of lading on ten days', or even shorter notice.

Who May Sue—Suit by Representative—Assignments—Subrogation.

While it is a maxim of the American Admiralty that suits should be maintained by the real party in interest, the courts have permitted *bona fide* representatives—such as shipmasters and other bailees, brokers, transshipment agents, and named consignees of goods sold in transit—to maintain suits for loss and damage, on condition that the true party in interest shall appear before the conclusion of the matter. *Soyo Maru* (4CCA), 1937 A. M. C. 642.

The true party in interest should, however, lose no time in coming forward. *City of Manilla* (*Czarnikow* vs. *Ellerman*) (EDNY), 1934 A. M. C. 756. State courts are less liberal in allowing suits to be instituted by parties not directly interested. *President Van Buren,* N. Y. Mun. Ct., 1936 A. M. C. 1598.

Furthermore, the prevailing American view of the doctrine of the underwriter's subrogation permits the underwriter to sue either in his own name or in the name of his assured. Underwriters who feel that there is likely to be a certain hostility to insurance companies very commonly conduct suits in the names of their assured.

An assignee of a cause of action must state the names of his assignors, but need not reveal what he paid for the assignments. *Mandu* (EDNY), 1930 A. M. C. 1672; on appeal, it was laid down that assignees may sue freely: 1940 A. M. C. 1150 (2CCA), certiorari denied, 1941 A. M. C. 241.

Forms of Action for Cargo Damage.

The plaintiff may, at his option, sue in tort for negligent damage to his goods shipped in good order and outturned in bad order, regardless of the bill of lading, *Troubadour,* 1937 A. M. C. 476 (SDNY); *Hakushika Maru,* 1934 A. M. C. 727 (SDNY), or in contract for breach of the contract to carry. A tort action is, in effect, converted into a contract action by the pleading of the bill of lading contract in the answer. See the *Oceania* (1909), 170 Fed. 893 at 897 (2CCA); also the *Pacific Maru,* 1925 A. M. C. 1446 at 1461 (SDGa), where suits were brought in tort for damage done while vessels were in tow, and converted into contract actions by pleading the contracts in the answers; a contract releasing a vessel owner *in personam* was held

also to release his vessel *in rem.* The libel should in either case state as fully as possible how and when the damage occurred. *Haiti,* 1937 A. M. C. 554 (5CCA). The carrier may compel the cargo-damage libellant to state the nature of the damage, *Hakushika Maru, supra,* but cannot compel him to specify the cause. *Loganbank,* 1936 A. M. C. 1882 (SDNY).

Practice in the United States in this respect appears to differ from that of the other common law countries, where the prevailing rule is that a party who can sue on a contract may not state his case in terms of tort. *Vita Food Products Co.* vs. *Unus Shipping Co.* (*The Hurry On*), 1938 A. M. C. 159, [1938] 2 Dominion L. R. 372 (Nova Scotia Sup. Ct.), affirmed generally and on this point, 1938 A. M. C. 257, [1939] A. C. 277, 63 Lloyds L. R. 21 (Privy Council).

If the gravamen of the action is negligence, the libel must allege negligence; for a party, to be in a position to prove negligence, must allege it. *Maryland,* 1937 A. M. C. 157 (SDNY).

In a suit for total loss of cargo, the libellant's admission of the fact that the vessel had stranded and thereafter sunk and become a total loss places the carrier in the position of sustaining the burden of showing that the immediate cause of the loss was an excepted peril; the libellant should therefore, to the best of his ability, answer interrogatories inquiring whether it is claimed that (1) the ship was unseaworthy; (2) or the cargo improperly cared for; or (3) there was lack of due diligence; and if so, state the particulars. *Middleton* vs. *Ocean Dom. S. S. Co.,* 1937 A. M. C. 1487 (SDNY).

In the present unsatisfactory state of the admiralty rules with relation to the right of discovery by deposition, there is much confusion as to the right of the cargo interests to inquire into the facts on which the ship's defenses will be supported, and also as to the right of the ship and carrier to inquire into the facts on which cargo will endeavor to support its burden of proof. It may be said that the ship can elicit information about the actual condition and good or bad order of the cargo at the moment of shipment, and as far back previously thereto as the moment of selection of the articles to be packed and their placing in the containers, it being presumed that the conditions then prevailing continued until the time of shipment. Relative to that presumption, the events of storage and transportation from the packing point to the ship's side may be inquired into. *Trentbank,* 1941 A. M. C. 299 (SDNY).

Freight—Ship's Option of Weight, Measurement, Description, or Value Basis.

Freight is usually payable, at ship's option, on weight or measurement, whichever basis will result in the highest sum of freight. In some trades, the description or value of the cargo enters into the freight rate classification.

Weight refers to the gross weight of the article shipped, including the container. The applicable rate is expressed in units of long tons (2240 lbs.), short tons (2000 lbs.), metric tons (2204 lbs.) or 100 lb. lots.

Measurement refers to the cubic space occupied by the shipment; which in units of 40 cubic feet, is referred to as measurement tonnage. To measure an article, the three extreme dimensions expressed in inches are multiplied together, and the result is divided by 1728 to determine the number of cubic feet. The applicable rate is expressed in units of cubic feet.

Obviously, heavy compact goods are carried in a weight basis; and light, loose goods are carried on a measurement basis. Goods which weigh about 40 lbs. per cubic foot will usually command the same rate on either basis.

When the character or description of the cargo, or its value, enters into the freight rate classification, the aspects of "false billing" and unfair competition must be borne in mind. These have already been discussed.

Dock Receipts.

A dock receipt may, by suitable reference, incorporate the terms and conditions of the ocean carrier's usual bill of lading; and these terms will accordingly be given effect even though no ocean bill of lading may ever be issued in respect of the goods, as may happen when the goods are destroyed while held under dock receipt. *Luckenbach S. S. Co.* vs. *American Mills Co.*, 1928 A. M. C. 558 (5CCA); *Eastern Outfitting Co.* vs. *Pacific Mail S. S. Co.*, 1928 A. M. C. 974 (NDCal); *Isbrandtsen-Moller Co.* vs. *M. S. Toledo*, 1939 A. M. C. 1300 (EDNY).

Garnishment of Merchandise Under Bill of Lading.

The Convention and Act of 1936 make no mention of the creditor's right to attach or garnish merchandise in the hands of a carrier as bailee, but this subject is dealt with by the Pomerene Act, Section 23 (page 22, *supra*). In *Ratto* vs. *Italian Line*, 1939 A. M. C. 1031 (City Court of New York), it was held that import merchandise in the possession of the Custom House could be effectively garnished by service of process on the freight department of the ocean carrier, whose intervention was necessary to complete delivery of the goods after their release from Customs.

Effective Dates.

Section 15 of the U. S. Act, providing in effect that the Act should not operate retroactively, was considered in the *Glasgow Maru*, 1939 A. M. C. 795, 103 F.(2d) 430 (2CCA), where sugar freight engagements were made in 1934 and cargo damage litigation was in progress when the Act became effective in 1936; the court had no difficulty in finding that the Act did not apply.

In Canada, an odd situation was suggested, because the Order in Council of 1936 appeared to give effect only to the Act, inasmuch as the Schedule of Rules appended thereto was not expressly mentioned. To settle all doubts, a second Order in Council was made in 1939, specifically giving effect also to the Schedule and the Rules declared therein. The texts of both Orders will be found at page 38, *supra*.

NOTES CONCERNING THE CANADIAN WATER CARRIAGE OF GOODS (HAGUE RULES) ACT OF 1936.

Textual Variations.

A comparison of the Canadian Act with the British Carriage of Goods by Sea Act reveals the following differences:

The *whereas* paragraphs of the enacting clauses have been omitted.

The enacting clauses are precisely like the British enacting clauses, except, of course, for the substitution of Canada for Great Britain and the substitution of references to the Canadian shipping acts instead of the British shipping acts.

Throughout the Canadian Act, the word *sea* has been struck out and the word *water* has been substituted. However, the word *sea* occurs, doubtless inadvertently, in Exception (1): "saving or attempting to save life or property at sea." The Act thus applies to fresh water commerce as well as on salt water. There is no survival of the Act of 1910, such as exists in the United States in the survival of the Harter Act.

In the Schedule:

Article I. Definition of goods. The English Act reads: "merchandises" in the plural; the Canadian bill reads: "merchandise" in the singular. This variation is plainly immaterial.

Article IV. The catch-all exception (Q). The 9th word *or* has been changed to *and*. The 14th word *or* has been retained, as in the British Act. Obviously the draftsmen intended to make the correction indicated by the opinion in *Hourani* vs. *Harrison* (1927), 28 Lloyds L. R. 120 (C. A.). But through inadvertence, the 9th word, instead of the 14th word, was altered from *or* to *and*. It would seem certain that a court will observe this slip in draftmanship, and read the 9th word as *or* and the 14th word as *and*.

Sub-section 5. $500 has been substituted for £100.

Article IX. The words *gold* value have been changed to *lawful money of Canada*.

Except as noted, the new Act makes the law of Canada "tackle to tackle" precisely like the Act of Great Britain of 1924.

It should be noted that the Canadian Act of 1910, now repealed, required the shipowner to make *and keep* the vessel seaworthy. But this had been interpreted to mean no more than that the vessel had to be seaworthy in fact, or that due diligence had been used, up to the moment of breaking ground at the start of the voyage. It did not mean that the vessel had to be kept seaworthy day by day as the voyage proceeded at sea. The Act of 1936 has therefore not changed the effect of the law in this respect.

Traffic Affected.

The Canadian Act applies to domestic water traffic, between Canadian ports, on the Great Lakes and rivers as well as on the sea coasts, as well as to outward movement in foreign trade. It does not apply to inward movements from abroad. See *Vita Food Products Co.* vs. *Unus Shipping Co.* (*The Hurry On*), 1939 A. M. C. 257, 63 Lloyds L. R. 21, [1939] A. C. 277 (Privy Council), which interpreted the corresponding Newfoundland Act in a case arising in Nova Scotia, a Province of Canada.

Effective Date. The effective date of the Act in Canada, and the curious argument that the Act had in 1936 been given effect without also making the Schedule and Rules effective, has already been referred to, at p. 215.

Cases.

Various Canadian cases have been discussed together with U. S. authorities in the preceding commentaries. *The John A. McDougald* (*Dominion Tankers, Ltd.* vs. *Shell Petroleum Co., Ltd.*), 1940 A. M. C. 986 (Sup. Ct. Can.) concerned loss of bulk gasoline cargo from a stranded tanker; the court applied the Act and excused the carrier from liability under the exception of errors of navigation. *The Aakre*, 1940 A. M. C. 154 (SDNY), concerned a stranding on a voyage outward bound from a Canadian port; the Canadian Act was held to govern.

Canadian Both-to-Blame Clause. It is observable that Canadian shipowners insert a both-to-blame clause, although Canada has enacted the Collision Convention rule of 1910; evidently this is done to guard against the chance of a suit in the United States and an effort to escape from the Canadian statute. Such an effort was made and defeated in *Canada Malting Co., Ltd.* vs. *Paterson S. S., Ltd.*, 285 U. S. 413, 1932 A. M. C. 512.

One leading Canadian bill of lading apparently provides that the bill may issue before the order and condition of the proferred cargo is ascertained, and that these facts may be subsequently endorsed on the bill of lading. This would be a risky proceeding in the United States, in view of Section 22 of the Pomerene Act, as there can be no assurance that a subsequent bad-order notation will overtake the document before it is negotiated.

NOTES CONCERNING THE NEWFOUNDLAND CARRIAGE OF GOODS BY SEA (HAGUE RULES) ACT, 1932.

The text of the Act is reproduced at page 39, *supra*. The subsequent alteration in the dominion status of Newfoundland, such that it became again a Crown Colony in 1933 has not changed the effectiveness of this statute. The event, indeed, gives assurance that the Newfoundland law will follow that laid down in London. It would seem that it extends to Newfoundland the effectiveness of the British ratification of the Convention, thus bringing into effect the reciprocity provisions of the Swedish and French enactments.

The only case noted under the Newfoundland Act is *Vita Food Products Co.* vs. *Unus Shipping Co.* (*The Hurry On*), 1939 A. M. C. 257, 63 Llyods L. R. 21, (1939) A. C. 277 (Privy Council), noted at various points in the preceding commentaries.

NOTES CONCERNING THE PHILIPPINE CARRIAGE OF GOODS BY SEA ACT, 1936.

The law of the Philippines, prior to the Act of 1936, was found in the Spanish Code of Commerce of 1886 and the Spanish Civil Code of 1889. See Fisher's Civil Code of Spain, with Philippine Notes and References (4th ed., 1930), and Espiritu's Code of Commerce of Spain, with Amendatory Laws of the Philippine Islands (4th ed., 1930). The Act of 1936 expressly does not repeal the Code of Commerce provisions; hence these remain in effect for the domestic trade of the Philippine Islands, much as the Harter Act remains in effect for the U. S. coastwise trade.

The Philippine Act of 1936, like the U. S. Act of 1936, applies *proprio vigore* only to foreign commerce, "to all contracts for the carriage of goods by sea to and from Philippine ports in foreign trade." It adopts *in toto* by reference the U. S. Act of April 16, 1936. The U. S. Act, in turn, expressly applies to the Philippines unless the Philippine Legislature shall exclude its application (Section 13). That legislature, far from excluding the effect of the U. S. Act, has expressly adopted it for Philippine foreign commerce. Trade between the Philippines and other ports and places under the American flag is not, by any ordinary definition, foreign commerce. Hence the U. S. and Philippine Acts do not apply to such trades, even though conducted in foreign bottoms and under foreign flags, unless the carrier expressly exercises the option given by Section 13 of the U. S. Act to carry under the provisions of that Act. The fact that the U. S. coastwise flag monopoly does not extend to the Philippine trades does not alter the fact that the U. S. trade with the Islands is domestic.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

MEMORANDUM, JUNE 5, 1937.

Reproduced in U. S. Statutes at Large, Vol. 51, p. 269.

COMPARISON OF THE CARRIAGE OF GOODS BY SEA ACT OF THE UNITED STATES OF AMERICA, APPROVED APRIL 16, 1936, AND THE BILLS OF LADING CONVENTION CONCLUDED AT BRUSSELS, AUGUST 25, 1924.

By the enacting clause of the Act Relating to the Carriage of Goods by Sea, approved April 16, 1936, every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of the Act.

TITLE I.

1. Section 3, subsection (2) of the Act does not contain the words "Subject to the provisions of Article 4" or their equivalent with which paragraph 2 of Article 3 of the Convention begins. The subsection, the words which are in the Convention but not in the act being placed in parentheses, is as follows:

> "Sec. 3. * * *
>
> "(2) ("Subject to the provisions of Article 4) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

2. Section 3, subsection (4) of the Act contains a proviso which is not in the Convention reserving the Act relating to bills of lading in interstate and foreign commerce, approved August 29, 1916 (Pomerene Act). The proviso is underlined in the following quotation from the Act:

> "Sec. 3. * * *
>
> "(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section; *Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled 'An Act relating to bills of lading in interstate and foreign commerce,' approved August 29, 1916 (U. S. C., title 49,*

secs. 81-124), commonly known as the 'Pomerene Bills of Lading Act.'"

[This proviso is primarily for the protection of subsequent holders of bills of lading. Prior to the enactment of the Pomerene Act a number of cases had arisen in the United States in which shippers had induced representatives of common carriers to sign bills of lading receipting for goods on the shipper's assurance that the goods would later be delivered to the carrier. The shippers would then dispose of the bills of lading through the usual discounting procedure. Subsequently these shippers for various reasons sometimes failed to deliver the goods to the carrier. The courts in the United States held that the fact that the goods never came into the custody of the carrier was a good defense to relieve it of liability to the holder of the bill of lading. The Pomerene Act changed this law so as to place the liability under such situations on the carrier.]

3. Section 3, subsection (6) of the Act contains a new paragraph, appearing as the second paragraph of the subsection, which is not in the Convention, providing that notice of loss or damage may be endorsed on the receipt given for the goods. The new paragraph is underlined in the following quotation from the Act:

"Sec. 3. * * *

"(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"*Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.*"

* * * * * *

4. The fourth paragraph of Section 3, subsection (6) of the Act contains a proviso which is not in the Convention to the effect that in all cases suit may be brought within one year. The proviso is underlined in the following quotation from the Act:

"Sec. 3. * * *

"(6) * * *

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.*"

5. The condition "if it shows the particulars mentioned in paragraph 3 of Article 3" appearing near the end of paragraph 7 of Article 3 of the Convention is not in the Act. Section 3, subsection 7, of the Act, the language which is in the Convention but not in the Act being placed in parentheses, is as follows:

"Sec. 3. * * *

"7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading; *Provided* that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted (if it shows the particulars mentioned in paragraph 3 of Article 3,), the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading."

6. Section 4, subsection (2) (j) of the Act contains a proviso which is not in the Convention affirming the responsibility of the carrier for his own acts in strikes, lockouts, et cetera. The proviso is underlined in the following quotation from the Act:

"Sec. 4. * * *

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general *Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts*";

7. Section 4, subsection 2 (q) of the Act differs from Article 4, paragraph 2 (q) of the Convention in that the word "and" is used at two places near the beginning of the paragraph in the Act where "or" is used in the Convention. Section 4, subsection (2) (q) of the Act is as follows:

"Sec. 4. * * *

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * *

"(q) Any other cause arising without the actual fault (or) *and* privity of the carrier (or) *and* without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

8. Section 4, subsection (4) of the Act contains a proviso which is not in the Convention to the effect that deviation for the purpose of loading or unloading cargo or passengers is prima facie unreasonable. The proviso is underlined in the following quotation from the Act:

"Sec. 4. * * *

"(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.*"

9. Section 4, subsection (5) of the Act contains phraseology in the first paragraph by which the reservation which the Senate made in giving its advice and consent to the ratification of the Convention substituting lawful money of the United States in place of "gold value" is adopted. In this subsection $500 is substituted for 100 pounds sterling pursuant to the privilege reserved by the Contracting

States in the second paragraph of Article 9 of the Convention. The words "the transportation of" are used before "goods" near the beginning of the subsection, and the words "binding or" which appear in the Convention are omitted from the next sentence of this subsection. The language appearing in Section 4, subsection (5) of the Act, but not in Article 4, paragraph 5 of the Convention, is underlined and the words "binding or" are placed in parentheses in the following quotation from the Act:

"Sec. 4. * * *

"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with *the transportation of* goods in an amount exceeding *$500* per package *lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit,* or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be (binding or) conclusive on the carrier."

10. Section 4, subsection (5) of the Act contains a sentence in the second paragraph which is not in the Convention to the effect that in no case shall the carrier be liable for more than the amount of damage actually sustained. The sentence is underlined in the following quotation from the Act:

"Sec. 4. * * *

"(5) * * * * *

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. *In no event shall the carrier be liable for more than the amount of damage actually sustained.*"

* * * * *

11. Section 4, subsection (5) last paragraph of the Act contains the phases "the transportation of the" before "goods" and the words "and fraudulently" after "knowingly," which do not appear in the Convention. This paragraph of the Act, the expressions mentioned being underlined, reads as follows:

"Sec. 4. * * *
"(5) * * * * *
"* * *

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with *the transportation of the goods* if the nature or value thereof has been knowingly *and fraudulently* misstated by the shipper in the bill of lading."

12. In Section 8 of the Act reservations are made saving from the operation of the Act the provisions relating to the liability of the owners of seagoing vessels in certain Acts of the Congress of the United States,—namely the Shipping Act of 1916 and sections 4281 to 4289 inclusive of the Revised Statutes of the United States or any amendments thereof,—all of which this Government considers to be within the scope of the reservation in Article 8 of the Convention.

Title II.

The provisions of Title II of the Act may be regarded as supplementary to the provisions of Title I, which, with the enacting clause taking the place of Article 10, correspond to the first ten articles of the Convention.

The provisions of sections 9, 11 and 12 in Title II of the Act are designed primarily to make clear that the provisions of Title I shall not be construed to affect certain features of American law and practice. Section 9 provides that a common carrier by water may not discriminate between competing shippers similarly placed in time and circumstance; section 11 provides that where under the customs of any trade the weight of any bulk cargo inserted in a bill of lading was ascertained or accepted by a third party other than the carrier or the shipper, and that fact is stated in the bill of lading, the bill of lading shall not be deemed to be prima facie evidence against the carrier as to the weight, and that the accuracy of the weight at the time of shipment shall not be deemed to have been guaranteed by the shipper; section 12 provides that nothing in the Carriage of Goods by Sea Act shall supersede any part of the Act of the United States entitled "An Act relating to navigation of vessels, bills of lading and to certain obligations, duties, and rights in connection with the carriage of property," approved February 13, 1893 (commonly known as "The Harter Act"), or of any other law which would be applicable in the absence of that Act, in so far as they relate to the duties, responsibilities and liabilities of the ship or carrier prior to the time when goods are loaded on or after the time they are discharged from the ship.

By section 10 an amendment is made to section 25 of the Interstate Commerce Act by adding at the end of paragraph 4 thereof a proviso to the effect that in so far as any bill of lading authorized under that paragraph relates to the carriage of goods by sea it shall be subject to the provisions of the Carriage of Goods by Sea Act.

Section 13 provides in effect that the Act applies in respect of foreign trade of the United States, including the foreign trade of territories and possessions. This section also provides that the Act does not apply to contracts for the carriage of goods by sea between ports of the United States and between ports of the United States and its possessions, or between the latter, namely in coastwise trade, but the Section also provides for the recognition of express statements applying the provisions of the Act in shipments in such trade, when they are made in bills of lading.

By section 14 authority is conferred on the President to suspend on not less than ten days notice any or all of the provisions of Title I upon certification by the Secretary of Commerce that the foreign commerce of the United States in its competition with the commerce of foreign nations is prejudiced by the operation of any of the provisions of Title I of the Act or by the laws of any foreign country or countries relating to the carriage of goods by sea.

The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to coordinate the Carriage of Goods by Sea Act with other legislation of the United States.

Washington, D. C.,
June 5, 1937.

CORRESPONDENCE BETWEEN THE U. S. STATE DEPARTMENT AND THE ITALIAN GOVERNMENT.

By a Note of March 29, 1938, the Italian Ambassador at Washington inquired as to the interpretation of the understanding expressed by the United States in ratifying the Convention, particularly as to the practical considerations which prompted these understandings. The State Department made the following reply:

"The second understanding to which the United States made its ratification subject reads as follows:

'that should any conflict arise between the provisions of the convention and the provisions of the act of April 16, 1936, known as the Carriage of Goods by Sea Act, the provisions of said act shall prevail.'

"The wording of the Carriage of Goods by Sea Act follows the wording of the convention with the exceptions of (1) the insertion in Title I of a number of clarifying words or expressions which make the language of the Act more specific than the language of the convention, and (2) the addition of provisions as Title II of the Act which prescribe the application under American conditions of the provisions of Title I and their relationship to existing American laws. These differences are set out in the memorandum of June 5, 1937, to which reference already has been made.

"It was the intention of this Government that the Carriage of Goods by Sea Act should bring the American statute law as to ocean bills of lading into accord with the Brussels convention and that it should not contain any provisions that would interfere with substantial compliance with the provisions of the convention on the part of the United States. In some instances the execution of this intention required the amendment of existing law. For example, Section 10 of the Carriage of Goods by Sea Act amends Section 25 of the Interstate Commerce Act. Section 10 is as follows:

'SEC. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "*Provided, however,* That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act."'

"Your Government inquired particularly concerning the Pomerene Bills of Lading Act. This Act is expressly reserved in Section 3, subsection (4) of the Carriage of Goods by Sea Act by the following proviso:

'Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916 (U. S. C., title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."'

"The Pomerene Bills of Lading Act is intended primarily for the protection of subsequent holders of bills of lading. It applies to all outward bills of lading (see United States Code, Title 49, Section 81), but it does not apply to import bills of lading, that is to say, it does not apply to bills of lading issued in other counturies for carriage of goods to the United States. A note in regard to the Pomerene Bills of Lading Act is contained in the memorandum of June 5, 1937. While this Government is of the opinion that none of the provisions of the Pomerene bills of lading act are deviations from the principles underlying the Bills of Lading Convention, it is glad to mention the following passages in both as illustrating their provisions on certain subjects.

"Section 3, subsection (4) of the Carriage of Goods by Sea Act which follows Article 3, subsection 4 of the Convention provides in part that '(4) Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described. . . .' The Pomerene Bills of Lading Act provides (U. S. C., Title 49, Section 102):

'§ 102. Liability for nonreceipt or misdescription of goods. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond

with the description thereof in the bill at the time of its issue. (Aug. 29, 1916, c. 415, § 22, 39 Stat. 542; Mar. 4, 1927, c. 510, Sec. 6, 44 Stat. 1450).'

"The Pomerene act provides (U. S. C., Title 49, Section 100):

'§ 100. Loading by carrier; counting packages, etc.; contents of bill. When goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (Aug. 29, 1916, c. 415, § 20, 39 Stat. 541).'

Section 3, subsection (5) of the Carriage of Goods by Sea Act which follows the language of Article 3, paragraph 5 of the convention provides:

'(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.'

Section 11 of the Carriage of Goods by Sea Act is as follows:

'Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.'

"With reference to the second understanding it may be added that it is a well established principle in the United States as laid down by the Supreme Court in the case of *Whitney* vs. *Robertson*, 124 United States Reports 190, that when a treaty and a statute relate to the same subject, the courts will always endeavor to construe them so as to give effect to both.

"The ratification of the Convention by the United States with its accompanying Carriage of Goods by Sea Act is an important step towards international uniformity, with reference to the carriage of goods by sea. It is believed that neither the understandings to which that ratification was made subject nor the provisions of either the Carriage of Goods by Sea Act or the Pomerene Bills of Lading Act are out of harmony with the provisions of the Convention."

APPENDIX A.

THE HARTER ACT.

27 U. S. Statutes at Large, 445. 46 U. S. C., Sec. 190-195.

[Feb. 13, 1893.]

Stipulations Relieving From Liability.

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Stipulations Relieving From Due Diligence.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly * equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Certain Exceptions, Conditioned on Due Diligence—Certain Other Exceptions.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall

* So in original; the word "to" should obviously be supplied.

exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Bills of Lading to be Issued—Contents.

Sec. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

Penalties—Lien—Recovery.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Limitation of Liability Laws Not Modified.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Live Animals.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

APPENDIX B.

RECOMMENDED GENERAL AVERAGE CLAUSES FOR U. S. TRADES.

1925 Form:

General Average payable according to York-Antwerp Rules 1924, 1 to 15 inclusive, and Rules 17 to 22 inclusive, and as to matters not therein provided for, according to the laws and usages of the port of * (here insert the appropriate clause as below, according to the particular trade).

Trade.	Clause.
(1) to one country in Western Europe (2) to Australia and to New Zealand	*destination.
For voyages to more than one country in Western Europe.....	*New York.
For all other voyages from or to Atlantic or Gulf ports (except intercoastal voyages)	*New York, and to be stated in New York.
For all other voyages from or to Pacific Coast ports (except intercoastal voyages)	*San Francisco, and to be stated in San Francisco.

For intercoastal voyages, either the New York or the San Francisco clause may be used.

Warning! The Jason clause, old or new form, must of course be added in all cases. See p. 86, *supra*.

Maritime Commission Form:

General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules, 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposits shall at the option of the carrier be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contact, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers.

Canadian General Average Clause.

General Average shall be adjusted according to York-Antwerp Rules 1924 and, as to matters not therein provided for, according to the laws and usages of the Dominion of Canada, and the general average shall be prepared by average adjusters selected by the carrier, the said adjusters to attend to the settlement and collection of the average subject to the customary charges.

APPENDIX C.

THE AMERICAN SHIPOWNERS' LIMITATION OF LIABILITY STATUTES.

AS AMENDED BY THE ACTS OF AUGUST 29, 1935, AND JUNE 5, 1936.

United States Code (1926), Title 46, Chapter 8.

United States Revised Statutes (1873), Title 48, Chapter 6.

NOTE: Additions introduced in 1936 by the 74th Congress,* 2nd Session, are in *italics*. The captions in **blackface**, the notes as to dates of enactment and the footnotes are not part of the text as enacted by Congress.

Liability of Masters as Carriers.

R. S. 4281. Originally enacted 1851. Unamended since 1871.
46 U. S. C., Sec. 181.

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals; coins; jewelry; bills of any bank or public body; diamonds or other precious stones; or any gold or silver in a manufactured or unmanufactured state; watches, clocks, or timepieces of any description; trinkets; orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures; gold or silver plate or plated articles; glass; china; silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any

*** The bills were known as H. R. 9969 and S. 4655; the House report was No. 2517, based on hearings held on February 19, 20, 21, 1936, printed by the Government Printing Office, No. 52796; the Senate report was a mere recommendation of passage, without discussion and without hearing by the Senate Committee on Commerce.**

form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Loss of Merchandise by Fire.

R. S. 4282. Originally enacted 1851. Unamended since 1874.*
46 U. S. C., Sec. 182.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Liability of Owner Not to Exceed Interest.

R. S. 4283. Originally enacted 1851. Amended in 1873, 1935 and 1936.
46 U. S. C., Sec. 183.

(a) The liability of the owner of any vessel, *whether American or foreign,* for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, *except in the cases provided for in subsection (b) of this section,* exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Loss of Life and Bodily Injury—Portion Increased to $60 per Ton.

Originally enacted in 1935. Amended in 1936.

(b) *In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount*

*** Effectiveness expressly preserved by Section 8 of the Carriage of Goods by Sea Act, 1936. *Cf.* the immunity against fire losses provided in the Carriage of Goods by Sea Act, Section 4, subsection 2(b).**

equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

Tonnage Defined.

Originally enacted in 1935. Amended in 1936.

(c) *For the purposes of this section* the tonnage of a *seagoing* steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

Life and Bodily Injury Claims Arising on Distinct Occasions.

Originally enacted in 1935. Amended in 1936.

(d) The owner of *any such* seagoing vessel shall be liable in respect of loss of life or *bodily* injury arising on distinct occasions to the same extent as if no other loss *of life* or *bodily* injury had arisen.

Loss of Life and Bodily Injury—Master's Privity or Knowledge.

Originally enacted in 1935. Amended and Re-enacted in 1936.*

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

Seagoing Vessel Defined.

Originally enacted in 1936.

(f) *As used in subsections (b), (c), (d), and (e) of this section and in section 4283-A, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript, self-propelled vessels, canal boats, scows, carfloats, barges, lighters, or non-*

* The "master's privity" provision as enacted in Section 2 of the Act of August 29, 1935 (with the expression "actual privity"), is expressly repealed by Section 5 of the Act of June 5, 1936.

descript nonself-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 4289 of this chapter, as amended.

Life and Bodily Injury—Time for Claim and Suit.

Originally enacted in 1935.

SEC. 4283A. Stipulations limiting time for filing claims and commencing suit.—(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: Provided, however, That such appointment be made within three years after the date of such death or injury.

Passenger Carriers—Limitations of Life and Bodily Injury Damage Suit Recovery to Stipulated Amounts and of Right to Court Trial Declared Against Public Policy.

Originally enacted in 1936.

Sec. 4283B. Stipulations Limiting Liability for Negligence Invalid.—It shall be unlawful for the manager, agent, master, or owner

*of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court * of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisons or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.*

Apportionment of Compensation.

R. S. 4284. Originally enacted 1851. Unamended since 1877.
46 U. S. C., Sec. 184.

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner or owners of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Transfer of Interest of Owner to Trustee.

R. S. 4285. Originally enacted 1851. Amended in 1873 and 1936.
46 U. S. C., Sec. 185.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction

*** The House bill read "a Court"; the Senate bill read merely "Court." The two bills were in all other respects identical. The Senate bill was passed by both the Senate and the House, the House bill being discarded.**

for limitation of liability within the provisions of this chapter, as amended, and the owner

(a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or

(b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by *the* court his interest in the vessel and freight, *together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended.*

Upon compliance with the requirements of this section all claims and proceedings against the owner *with respect to the matter in question* shall cease.

Charterer Who Mans, Victuals and Navigates the Vessel Shall Be Deemed Owner.

R. S. 4286. Enacted in 1851. Unamended.
46 U. S. C., Sec. 186.

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

Remedies Reserved.

R. S. 4287. Enacted in 1851. Unamended.
46 U. S. C., Sec. 187.

Nothing herein * shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud or other malversation of such master, officers, or seamen, respectively, nor to lessen or take

*** Originally: "In the five preceding sections."**

away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

Limitation of Liability of Owners Applied to All Vessels.

R. S. 4289. Enacted in 1851. Amended in 1875, 1886 and 1936.
46 U. S. C., Sec. 188.

Except as otherwise specifically provided therein, the provisions of the *nine* preceding sections and of section 18 of *the* Act *entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes,"* approved June 26, 1884 (23 Stat. 57; U. S. C., 1934 Ed., title 46, sec. 189), shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

Limitation of Liability of Owners of Vessels for Debts, Except Wages.

23 Stat. 57. Act of June 26, 1884, Sec. 18. Unamended.
46 U. S. C., Sec. 189.

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels * and freight pending; *Provided,* That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners.

Liability of Master and Owners for Damage to Passengers.

R. S. 4493. Enacted in 1871. Unamended.
46 U. S. C., Sec. 491.

Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of the damage if it

* So in original.

happens through any neglect or failure to comply with the provisions of law herein prescribed (i. e., R. S. Chapter LII, section 4399-4462; 46 U. S. Code Chapter 14, sections 361-440; Chapter 15, sections 451-498; and sections 214 and 215), or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damage for any such injury caused by any such master, mate, engineer or pilot.

A full account of the legislative and judicial history of the foregoing sections will be found in Maritime Law Association Document No. 196 (January, 1935). The development of the 1935 and 1936 amendments is traced in Documents Nos. 197, 199, 200, 202, 205, 207, 210, 212, 213, 214, 215 and 224, and in the hearings of the Committee on Merchant Marine of the House of Representatives on April 3 and May 13, 1935, and February 19, 20, 21, 1936.

APPENDIX D.

THE CANADIAN SHIPOWNERS' AND CANAL AND DOCKOWNERS' LIMITATION OF LIABILITY STATUTE.

Canada Shipping Act, 1934.

24-25 Geo. V. Chap. 44, page 243.

Limitation of Liability.

When Owners Not Liable to Whole Damage.

649. (1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity that is to say—

(i) where any loss of life or personal injury is caused to any person being carried in such ship;

(ii) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;

(iii) where any loss of life or personal injury is, by reason of the improper navigation of the ship, caused to any person carried in any other vessel;

(iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

be liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

From and After Launching.

(2) The provisions of this section shall extend and apply to the owners, builders, or other parties interested in any ship built at any port or place in Canada, from and including the launching of such ship until the registration thereof under the provisions of this Act.

Distinct Occasions of Damage.

(3) The owner of every ship, or share therein, shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen.

Power of Court to Consolidate Claims.

650. (1) Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, the President or the Puisne Judge of the Exchequer Court may, on the application of that owner, determine the amount of his liability and distribute that amount rateably among the several claimants. Such President or Puisne Judge may stay any proceedings pending in any

court in relation to the same matter, and he may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just.

Remission to District Judge in Admiralty.

(2) The President or the Puisne Judge of such Court, instead of exercising in person the powers conferred upon him by subsection one of this section may, by order of his court, commit to any District Judge in Admiralty of such Court the power to determine as aforesaid, whereupon such District Judge may proceed as if he were, and with the powers of, the Judge to whom such application of such owner was made.

Extension of Limitation of Liability.

651. The limitation of the liability of the owners of any ship set by section six hundred and forty-nine of this Act in respect of loss of or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship.

Limitation of Liability of Dock, Canal and Harbour Owners or Conservators.

652. (1) The owners of any dock or canal, or a harbour commission, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding thirty-eight dollars and ninety-two cents for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring is, or within a period of five years previous thereto has been, within the area over which such dock, or canal owner, or harbour commission performs any duty or exercises any power. A ship shall not be deemed to have been within the area over which a harbour commission performs any duty or exercises any power by

reason only that it has been built or fitted out within such area, or that it has taken shelter within or passed through such area on a voyage between two places both situated outside that area, or that it has loaded or unloaded mails or passengers within that area.

Meaning of "Dock."

(2) For the purposes of this section the term "dock" shall include wet-docks and basins, tidal-docks and basins, locks, cuts, entrances, dry-docks, graving-docks, gridirons, slips, quays, wharves, piers, stages, landing places, and jetties.

Meaning of "Dock or Canal."

(3) For the purposes of this section the term "owners of a dock or canal" shall include any person, or authority, having the control and management of any dock or canal, and any ship repairer using the same, as the case may be.

No New Liability Created.

(4) Nothing in this section shall impose any liability in respect of any such loss or damage on any such owners, or commission, in any case where no such liability would have existed if this Act had not passed.

"Owner" May Include Charterer.

653. The provisions of sections six hundred and forty-nine to six hundred and fifty-two, inclusive, of this Act shall be read so that the word "owner" shall be deemed to include any charterer to whom the ship is demised.

Tonnage, How Calculated.

654. (1) For the purposes of sections six hundred and forty-nine to six hundred and fifty-two, inclusive, of this Act, the tonnage of a steamship shall be her register tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage; and the tonnage of a sailing ship shall be her register tonnage.

Not to Include Space Occupied by Seamen.

(2) There shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is

certified under the regulations contained in the eighth schedule hereto with regard thereto.

Measurement of Tonnage; How Made.

(3) The measurement of such tonnage shall be,

(*a*) in the case of a British ship registered elsewhere than in Canada, according to the law of that part of His Majesty's dominions where the ship is registered;

(*b*) in the case of a ship registered in Canada or recognized as a British ship, according to the law of Canada;

(*c*) in the case of a foreign ship, according to the law of Canada, if capable of being so measured.

Foreign Ship Incapable of Canadian Measurement.

(4) In the case of any foreign ship, which is incapable of being measured under the law of Canada, the Minister shall, on receiving from or by direction of the court hearing the case, such evidence concerning the dimensions of the ship as it is found practicable to furnish, give a certificate under his hand stating what would, in his opinion, have been the tonnage of such ship if she had been duly measured according to the law of Canada; and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship.

Where Several Claims Arise on One Occasion.

655. The limitation of liability under section six hundred and fifty-one and six hundred and fifty-two of this Act shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any Act of Parliament and notwithstanding anything contained in such Act.

CARRIERS OF GOODS BY WATER.

24-25 Geo. 5, Ch. 44, page 246.
(1934)

Must Convey Passengers and Goods.

656. Carriers by water shall, at the times and in the manner and on the terms of which they have respectively given public notice, receive and convey according to such notice all persons applying for passage, and all goods offered for conveyance, unless, in either case, there is reasonable and sufficient cause for not doing so.

Responsibility for Goods.

657. Subject to the provisions of the *Water-Carriage of Goods Act* carriers by water shall be responsible not only for goods received on board their vessels, but also for goods delivered to them for conveyance by any such vessel, and they shall be bound to use due care and diligence in the safekeeping and punctual conveyance of such goods.

Personal Baggage of Passengers.

658. Carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessels, but such liability shall not extend to any greater amount than two hundred dollars, or to the loss of or damage to any gold or silver, diamonds, jewels, or precious stones, money or valuable securities or articles of great value, unless the true nature and value of such articles so lost or damaged has been declared to the carrier in writing.

APPENDIX E.

U. S. INTERSTATE COMMERCE ACT, 1887-1920.

41 Statutes at Large, 474-497.
49 U. S. Code, Sections, 1-27.

NOTE: Section 25, reproduced in the first printing of this book in 1937, was repealed by the Transportation Act of Sept. 18, 1940, upon the enactment of Part III of the Interstate Commerce Act, relating to Water Carriers. Act of Sept. 18, 1940, c. 722, Title I, §14(a), 54 Stat. at L. 919. The new provisions relating to regulation of coastwise and intercoastal water carriers lie beyond the scope of this volume.

APPENDIX F.

THE PHILIPPINE CARRIAGE OF GOODS BY SEA ACT, NO. 65 OF 1936.

The National Assembly of the Philippine Islands.

Bill No. 2330, Approved October 22, 1936.

Be it enacted, etc.

SEC. 1. That the provisions of Public Act No. 521 of the 74th Congress of the United States, approved on April 16, 1936, be accepted, as it is hereby accepted to be made applicable to all contracts for the carriage of goods by sea to and from Philippine ports in foreign trade:

Provided, That nothing in this Act shall be construed as repealing any existing provisions of the Code of Commerce which are now in force, or limiting its applications.

SEC. 2. This Act shall take effect upon its approval.

Approved, October 22, 1936.

See Notes concerning this Act, at page 218, *supra*.

APPENDIX G.

"FALSE BILLING" ACT.

Public No. 685—74th Congress.
[S. 3467]
46 U. S. Code 815.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Discriminatory Acts Prohibited; Penalties.

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

Preference or Prejudice to Person, Locality or Traffic.

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

False Billing, Etc. to Obtain Lower Rate.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Influencing Insurance Rates.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Penalty.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. (As amended June 16, 1936, c. 581, 49 Stat. 1518.)

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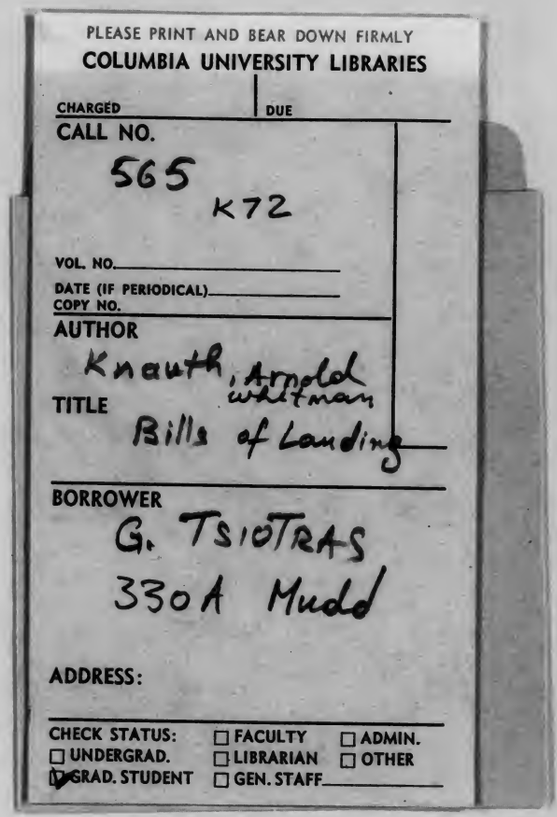

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